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v.
Planned Parenthood Shasta-Diablo, Inc.

Docketed:
October 10, 1995 Court: Supreme Court of California

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1 pp

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRISTINE WILLIAMS and CITIZENS FOR LIFE, *Petitioners,*

v.

PLANNED PARENTHOOD SHASTA-DIABLO, INC., *Respondent.*

Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an injunction banning all "picketing, demonstrating and counseling" on a public sidewalk restrict more speech than necessary where the injunction is not necessary to protect access?

2. Did the lower court err in upholding an injunction banning all "picketing, demonstrating and counseling" on a public sidewalk, where a prior, less restrictive injunction had adequately served the legitimate state interests?

3. Can an injunction banning all "picketing, demonstrating and counseling" on a public sidewalk be justified by the state interest in protecting the health and safety of patients by shielding them from "physical confrontations" with demonstrators, where such confrontations consist of lawful speech activity?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case. Neither of the petitioners is a corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. _____

CHRISTINE WILLIAMS and CITIZENS FOR LIFE, *Petitioners,*

v.

PLANNED PARENTHOOD SHASTA-DIABLO, INC., *Respondent.*

Petition for Writ of Certiorari to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The original decision of the Supreme Court of California is reported as *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629 (1994) (App. 69a). The decision of this Court vacating that decision and remanding the case is reported as *Williams v. Planned Parenthood Shasta-Diablo, Inc.* 115 S.Ct.413 (1994) (App. 111a). The decision of the Supreme Court of California on remand is reported as *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 10 Cal. 4th 1009, 43 Cal. Rptr. 2d 88, 898 P.2d 402 (App. 1a). The decision

of the Court of Appeal of California is reported as *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 18 Cal. App. 4th 359, 16 Cal. Rptr. 2d 540 (1993) (App. 45a). The decision of the court of appeal denying rehearing (App. 63a) and the decisions of the Superior Court of Solano County, California (App. 41a, 64a, and 67a) are unreported.

JURISDICTION

The Supreme Court of California entered its decision on August 2, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In this case, a trial court awarded an injunction confining all speech activities of petitioners to an area across a four-lane street from the respondent's clinic. This restriction was significantly broader than that requested by the plaintiffs. Nonetheless, the restriction was upheld by the state court of appeals and the California Supreme Court, and then reaffirmed by the latter after this Court's remand for reconsideration in light of *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994).

Petitioners are an individual and an unincorporated association motivated by their concern for women and children to speak out against abortion. Respondent Planned Parenthood Shasta-Diablo is an abortion business which operates several clinics, including one at 990 Broadway, Vallejo, California. This litigation arose out of the expressive activities of petitioners at this location.

Beginning in March, 1990, Petitioners would go to respondent's facility on Thursdays, when abortions were scheduled. Some people entered the parking lot shared by the clinic and another business for the purpose of offering information and counseling, both spoken and written, to women seeking abortions at respondent's clinic.[1]

In August, 1990, respondent brought an action seeking preliminary and permanent injunctive relief. In particular, respondents sought an order barring petitioners from the parking lot, and limiting the number of picketers on the public sidewalk to two. Respondent also submitted declarations which stated that the sidewalk in front of the clinic was "ideal for pickets" and that two pickets could stand there "in safety." The trial court granted the order.

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[1] Although both the trial court and the supreme court state that "as many as one hundred" people gathered at the clinic, App. 43a, 2a, the testimony was that the usual number was about eight, and on *one* weekend day, when no abortions were scheduled, there were almost one hundred people on the sidewalk in front of the clinic. *See* App. 99a.

In September, 1990, the court held a hearing on the preliminary injunction, at which two witnesses testified, a Planned Parenthood employee and a pro-life counselor. App. 24a. The court issued a preliminary injunction which excluded the picketers from the parking lot but increased the number of picketers on the sidewalk to four. App. 67a.

In April, 1991, the trial on the permanent injunction was held in one afternoon, with only three witnesses testifying, two from Planned Parenthood and the third being petitioner Christine Williams. App. 25a, 31a. Based on this testimony, supplemented by testimony from the hearing on the preliminary injunction, the court issued a permanent injunction. *Inter alia*, the petitioners were enjoined "[f]rom referring in oral statements while at the picket site to physicians, staff, or clients as 'murdering' or 'murderers,' 'killing' or 'killers;' or to children or babies being 'killed' or 'murdered' by anyone in the PLANNED PARENTHOOD building in the presence of children under the age of 12." The court also ordered that "All picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall only take place along the public sidewalk across the street from the PLANNED PARENTHOOD building." App. 43a–44a.[2]

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[2] The similarity between the court's order and the injunction upheld in *Bering v. SHARE*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987), is worth noting. The provision concerning the use of particular words in the presence of children is identical to the one in *Bering*. The place restrictions are also very much alike in that, rather than banning speech from a particular area, they dictate that all "picketing, demonstrating and counseling" may take place only at a particular location.

This is noteworthy because, in both these provisions of this injunction, the trial court exceeded what the plaintiffs had sought, and consequently the scope of the evidence presented. Planned Parenthood had expressed concern over the picketers' children running on the sidewalk, not about what they might hear. There was no evidence at all, at any stage of the proceedings, on the issue of the effect of the picketers' speech on children. Similarly, with the place restriction, the primary issues before the court were whether picketers should be barred from the parking lot and whether there should be any limitation on their number on the public sidewalk. The necessity or desirability

Petitioners appealed to the First Appellate District, which overturned the restriction on the content of speech, but affirmed the place restriction.[3] The court of appeal, using the standard applicable to time, place, and manner restrictions on speech imposed by statutes and ordinances, held that the place restriction was *not* narrowly tailored to serve the state's interest in maintaining the free flow of pedestrian and vehicular traffic. App. 53a–54a. Rather, in a convoluted holding which placed the petitioners in the role of state actors, the court held, "[W]e are compelled by our *state* Constitution to strike down restrictions on a woman's right of procreative choice unless the restriction is narrowly tailored to serve a compelling governmental interest." App. 57a (original emphasis). On that reasoning, the court "struck down" the petitioners' speech activities by upholding the place restriction.

Petitioners sought and were granted review in the California Supreme Court. On May 26, the supreme court, with one justice dissenting, upheld the lower court. The court did not disturb the court of appeal's conclusion that the ban was not narrowly tailored to protect pedestrian and vehicular traffic. App. 74a (n. 4); App. 87a (n. 10) ("the critical issue was not access"). Instead, the majority held that "the place restriction serves the substantial government interest in protecting the patients' physical and emotional health and safety." App. 84a (n. 9). The ban on *all* speech on the sidewalk was narrowly tailored because "the state's interest was to alleviate the hazardous medical environment created by the intimidating presence of protesters in close proximity to patients." App. 87a. Nothing short of a complete ban would "mitigate

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of banning *all* speech activity from the sidewalk was simply never raised or addressed.

Apparently the trial court, instead of weighing the law and the evidence, took the short cut of plagiarizing *Bering v. SHARE*.

[3] Petitioners appealed, on state constitutional grounds, their exclusion from the parking lot. Petitioners also appealed three other provisions of the injunction, based on the lack of evidence. The court of appeal affirmed these provisions, which are not at issue here.

the *emotional* impact on women forced to navigate even a limited number of pickets and sidewalk 'counselors.'" App. *Id.* (emphasis added).

The state supreme court concluded that the place restriction left open ample alternatives, because the petitioners are "within plain view of their target audience," and should anyone wish to speak to the petitioners, "it is a short walk across the street." App. 90a.

This Court granted a petition for writ of certiorari, vacated the decision of the state supreme court, and remanded for further consideration in light of *Madsen*. 115 S.Ct. 413 (1994). App. 111a. On remand, the California Supreme Court reaffirmed, holding that confining the petitioners to the opposite side of the street was justified by the state interests in ensuring "safety and order" and protecting unfettered access to and egress from the clinic. App. 14a.

As with the original decision, Justice Joyce Kennard strongly dissented from the Court's ruling. Meticulously examining the evidence, she noted that the trial court had first issued an order limiting to two the number of picketers on the sidewalk. After the hearing on the preliminary injunction, the court increased the number to four picketers. Then, after a trial in which no competent evidence was presented that this injunction had in any way failed to preserve access and maintain order, the trial court nonetheless banished all picketers to a location where "the protesters must make their voices heard over the roar of traffic on the busy four-lane avenue separating them from the clinic." She concluded:

> Based on the record in this case, there simply was no need, practically or legally, to banish the picketers to the opposite side of the busy four-lane avenue, and to bar them from peacefully expressing their views in front of the clinic. Accordingly, the trial court's permanent injunction burdened more speech than was necessary to protect the clinic's staff and patients, and thus violated the First Amendment to the United States Constitution.

App. 38a.

REASONS FOR GRANTING THE WRIT

The decision of the lower court poses the question of whether *Madsen v. Women's Health Center*, contrary to its explicit limiting language, gave lower courts *carte blanche* to create speech-free zones outside of abortion facilities.

Madsen recognized a special response to special circumstances: courts may impose limited injunctive restrictions on otherwise protected speech activity, where those restrictions burden no more speech than necessary to serve significant governmental interests, and where more narrowly-drawn restrictions have failed.

Although the lower court here gave lip service to what this Court actually held, its application of *Madsen* to the record in this case strips away any requirement of judicial restraint in creating "buffer zones" around abortion businesses.

For example, the court below authorizes imposition of a speech-free zone where there is a "narrow"[4] sidewalk, because two picketers "*could* effectively block pedestrian or vehicular traffic," regardless of whether there is evidence that such blocking has taken place. App. 14a (emphasis added).

The court below authorizes imposition of a speech-free zone if the picketers *ever* interfered with access, even if there is no evidence of any such interference having occurred after a more narrowly tailored injunction was imposed.

The court below approved an order that does not just exclude speech activity from an area where such activity threatens access,

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[4] Approximately four to six feet wide. App. 53a, n. 3

but dictates that speech activity only take place in a small, circumscribed area.

Finally, the court below sanctioned creation of a speech-free zone based on the protesters' "physical tactics," (App. 12a), even though the "physical" conduct consists of leafletting, picketing, and approaching people to speak to them. To do so, the court first characterizes these activities as "harassing," "pursuing," "pressing literature on", "confronting," "intimidating," "stalking," and "exhorting" women. App. 3a, 4a, 11a, 13a. Using these loaded terms to describe the protesters' speech activity makes it the work of a moment to ban them in the interest of protecting the "health and safety of medical patients." App. 16a. And, *mirabile dictu*, this can all be accomplished without "any reference whatsoever to petitioners' anti-abortion viewpoint."[5] App. 11a.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *MADSEN*.

A. *The lower court erred in justifying the imposition of a zone based on inference rather than evidence.*

In its original opinion in this case, the state supreme court noted that the court of appeal had held that the place restriction was *not* narrowly tailored to serve the governmental interest in keeping the street and sidewalk clear for vehicles and pedestrians. App. 74a (n. 4). The supreme court did not disturb or question that holding; on the contrary, the court held that "merely keeping the sidewalks free for passage does not address the problem identified by the trial court of protesters hounding and upsetting unwilling listeners." App. 87a. Thus, "*the critical issue here was not access*, but health and safety." App. *Id.*, n. 10 (emphasis added).

[5] "One cannot help but wonder if the majority would as readily have upheld the trial court's injunction abridging the picketers' right to free speech had the picketers been striking employees of the clinic instead of anti-abortion protesters." App. 38a (n. 5) (Kennard, J., dissenting).

Not surprisingly, on remand after *Madsen*, the supreme court found that access was an issue after all. The court noted that, given the "close physical confines" of the area around the clinic, "even one or two picketers could effectively block pedestrian or vehicular traffic." App. 14a. Though the court goes on to suggest that there was evidence of interference and obstruction while the preliminary injunction was in place, there was in fact no such evidence.[6] Rather, the justification rests on the mere inference that obstruction will take place if picketers are allowed on the sidewalk, in spite of the statements of respondent's own witnesses to the contrary. See App. 23a–24a. This rationale would justify a ban on picketing on virtually any sidewalk.

B. *The lower court erroneously held that zone could be justified to protect the health and safety of patients by preventing "stress and anxiety."*

The lower court cited a second state interest justifying the imposition of a zone, namely, protecting the health and safety of medical patients. In support of its position, the court cited this Court's upholding of noise restrictions in *Madsen*. The lower court asserted that this interest in "maintaining a relatively tranquil environment for patients 'during surgery and recovery periods'" (App. 14a) could also justify banning banning protesters from the public sidewalk outside a surgical facility, not because of noise, but because of "physical confrontations" between patients and protesters. App. 16a.

In this holding, the lower court failed to see the distinction between speech activity which immediately and inescapably invades a medical facility, thus putting patients at risk, and speech activity which is confined to the public forum. Indeed, in supposedly restating this Court's holding, the lower court interjected its own expanded version: "Recognizing the 'emotional strain and worry'

[6] *See infra* Section II, for a discussion of the court's treatment of the evidence on this issue.

that naturally afflict patients *entering and leaving* medical facilities, . . . the *Madsen* court held that the restrictions were necessary 'to ensure the health and well-being of patients at the clinic.'" App. 16a (emphasis added). However, the noise restriction upheld by this Court applied only to noise audible to patients *inside the clinic*. 114 S.Ct. at 2528. It was as such that the Court found it a necessary restriction to protect the health and well-being of patients.

In contrast, this Court specifically rejected an attempt to ban public forum speech activity for the purpose of shielding patients from unpleasant or upsetting speech. In striking down a provision forbidding uninvited approaches of patients within 300 feet of the clinic, this Court stated:

> Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, [citation omitted], this provision cannot stand . . . "As a general matter we have indicated that in public debate our own citizens must tolerate insulting, even outrageous speech in order to provide adequate breathing spaces to the freedom protected by the First Amendment."

114 S.Ct. at 2529 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988).[7]

This asserted interest in protecting persons from "physical confrontation" is itself constitutionally suspect. Many traditional forms of protected speech involve "direct" or "physical confrontation" with speakers who may or may not be welcome. *E.g.*, *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("the most effective, fundamental and perhaps economical avenue of political discourse [is] direct

[7] This Court also struck down a ban on "images observable" to patients in the clinic, even if such a ban "was intended to reduce the level of anxiety and hypertension suffered by patients inside the clinic." This Court noted that "The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable." 114 S.Ct. at 2529.

one-on-one communication"); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (accosting strangers and challenging their religious beliefs); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (stationing "store watchers" outside boycotted businesses); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (picketing outside business); *Lovell v. Griffin* 303 U.S. 444 (1938) (leafletting).

Finally, even if the interests in protecting the patients' health and safety could, in some circumstances, justify the imposition of a zone, there was no evidence in the instant case that any woman's health or safety was ever jeopardized. The trial court found simply that some women had become emotionally distraught. App. 43a. After that, everything is sheer speculation; the record is utterly silent as to any adverse physical effects of petitioners' activities.

It is difficult to see how the present injunction can be held to "burden no more speech than necessary" to serve the interest in protecting patients' health and safety when, unlike *Madsen*, there is no evidence of this interest being threatened in the instant case.

II. THE DECISION OF THE LOWER COURT CONFLICTS WITH THIS COURT'S DECISION IN *HURLEY v. IRISH-AMERICAN GLIB*.

This Court has repeatedly held that the duty of a reviewing court "is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

> Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, *without deference to the trial court*. . . . The requirement of independent appellate review is a rule of federal constitutional law, . . . which generally requires us to review the finding of facts by a State court where a conclusion of law as to a Federal right and a finding

> of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. . . . This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. . . . Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct, our obligation is to make an independent examination of the whole record, so as to assure ourselves that this judgment does not constitute a forbidden intrusion on the field of free expression.

Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston, 115 S.Ct. 2338, 2344 (1995) (emphasis added; citations and editing marks omitted).

In the instant case, an independent examination of the record is far from a Herculean task for a reviewing court. The trial on the permanent injunction took place in one afternoon, with only three witnesses being called. The trial court's findings of fact consist of only thirteen statements, of which four are descriptions of the site. App. 42a-43a.

Unfortunately, instead of examining the record to see if the evidence supported the trial court's findings of fact, the supreme court embellished the trial court's findings of fact with its own "findings of fact," regardless of whether these had any support in the record at all. The most significant instances of this concern the issues of whether the petitioners obstructed access and whether they violated the preliminary injunction.

The supreme court stated, "It is sufficient, as the trial court found here, that petitioners had significantly blocked driveways, surrounded patients' cars, stalked and obstructed patients walking to and from their cars, and had thereby significantly 'interfered' with clinic access." App. 15a.

The trial court's order contains no such findings. App. 42a-43a. The only finding concerning interference with or obstruction of access refers to petitioners' stationing themselves in the parking lot, in front of the clinic door: "7. Defendants and their picketers/counselors stand directly in front of plaintiff's office door and interfere with or obstruct entrance to and from plaintiff's clinic." App. 42a. This office door is some one hundred feet from the driveways.[8] There is nothing in the trial court's findings about blocking driveways,[9] nothing about surrounding cars, nothing about obstructing patients walking to their cars.

The court also stated, "The evidence established that one or two pickets could effectively block passage along the sidewalk and impede traffic." App. 17a. This was not one of the trial court's findings, nor was any such evidence introduced. In fact, this "evidence" originated as one of respondent's arguments in the briefing on remand, after *Madsen* resurrected the issue of access.

Likewise, in discussing the effectiveness of the preliminary injunction, the lower court stated, "The evidence at trial indicated that picketers had not followed the preliminary injunction." Justice Kennard discusses this point in great depth in her dissent. App. 30a-32a. The "evidence" consists of two ambiguous statements by Planned Parenthood witnesses, to the effect that some people may have disobeyed the injunction.[10] As Justice Kennard

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[8] *See* Diagram A, App. 39a. Obviously, the court is referring here to activity that allegedly took place *before* the temporary restraining order and preliminary injunction issued, as these orders restricted the petitioners' speech activity to the public sidewalk.

[9] Though there was evidence introduced concerning petitioners walking slowly across the driveway, this was presented at the hearing on the *preliminary* injunction. No similar evidence was introduced at the trial on the permanent injunction, and the court made no finding that such activity had taken place.

[10] *See* App. 25a-26a for full text of these statements.

points out, the statements are so vague and conclusory, devoid of any factual content, that they are not even competent evidence. *Id.*

Moreover, even assuming *arguendo* that Respondent's witnesses were correct in suggesting that some persons had violated or were about to violate the preliminary injunction, the record is silent as to when these alleged violations took place. Respondent's witness, Marsha Anderson, testified that she called the police "to issue the injunction a couple of times, to hand it out to people who were on the sidewalk and were about to break the rules or breaking the rules." App. 31a. This certainly suggests that the alleged violations took place soon after the temporary restraining order or the preliminary injunction issued, and that the alleged violators were persons who had not yet been served with the injunction and were unaware of its terms.

There is also no indication from the testimony as to what form these alleged violations might have taken. It could have been having more than four people on the sidewalk, or stepping into the parking lot. There is absolutely no basis on which to conclude that the alleged violations of the preliminary injunction consisted of obstructing access.

Nevertheless, on the basis of this fragmentary, ambiguous evidence, the supreme court upheld an injunction banning speech in all but one small area of a public sidewalk, stating that it burdened no more speech than necessary to ensure access and protect patients. The court's method of conducting its "independent examination of the record" flagrantly conflicts with this Court's holdings in *Hurley* and *New York Times v. Sullivan*.

CONCLUSION

The lower court asserted "The factual parallels between ***Madsen*** and the case at bar are indeed striking." App. 12a. However, when the record in ***Madsen*** and in the case at bar are reduced to their common denominators, what emerges is a factual pattern similar to virtually every situation where pro-life individuals demonstrate and counsel outside abortion facilities.

In every such case, "highly focused" picketing and sidewalk counseling takes place, often on the public sidewalk. Whenever there is picketing, anti-abortion or otherwise, on a sidewalk and near driveways, one may expect some marginal slowing of pedestrian and vehicular traffic, which the target of the picket will be quick to label as interference with access. Moreover, it is difficult to imagine any pro-life speech activity that would not ever occasion some higher degree of stress and anxiety in some women considering abortion. Even the lower court here acknowledged that having picketers sixty feet away across the street "will assuredly result in some distress to patients." App. 90a.

As common as these elements are, the California Supreme Court sees in them the justification for an enormous, literally unlimited speech-free zone around an abortion clinic. The supreme court's decision amounts to a license to close off the public sidewalk to one side of the abortion debate, in the jurisdiction which is the site of approximately twenty per cent of all abortions performed in this country. Those who dare to defend their rights, in spite of the ridiculously low threshold set by the supreme court for justifying a zone, face the prospect of having to pay ruinous attorneys' fees if they are not successful.[11]

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[11] See *Feminist Women's Health Center v. Blythe*, 32 Cal. App.4th 1641, 39 Cal. Rptr. 2d 189 (1995) (upholding some $100,000 in attorney fees against pro-life defendants who unsuccessfully resisted imposition of speech-free zone) *petition for cert. filed sub nom. Reali v. Feminist Women's Health Center*, No. 95-366 (August 30, 1995).

The relevant portions of the record in this case can be found in the lower court decisions and orders in the appendix to this petition. From these, this Court can easily determine that the decision below should be summarily reversed. Alternatively, this Court should grant this petition and set the case for plenary review.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

S031721
Ct. App. No. 1/3 A055117

Solano County
No. 110090

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,
Plaintiff and Respondent,

v.

CHRISTINE WILLIAMS, et al.,
Defendants and Appellants.

[Filed July 31, 1995]

In *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal.4th 860 (*Planned Parenthood I*), this court upheld an injunction limiting the protest activities of petitioners, anti-abortion activists, to the sidewalk across the street from a women's health clinic operated by Planned Parenthood, Shasta-Diablo, Inc. (Planned Parenthood). Thereafter, the United States Supreme Court announced its decision in *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. ____ [114 S.Ct. 2516, 129 L.Ed.2d 593] (*Madsen*), which upheld, under a slightly stricter constitutional standard than we applied in *Planned Parenthood I*, an injunction creating a buffer zone of 36 feet around a women's health clinic, thereby effectively restricting the anti-abortion protesters in that case to

the other side of the street from the clinic. (512 U.S. at pp. ____ [114 S.Ct. at pp. 2526-2527].)

Petitioners herein petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court granted certiorari, vacated our earlier judgment, and remanded the cause to this court "for further consideration in light of" *Madsen*. ((1994) ____ U.S. ____ [115 S.Ct. 413].) We requested and received supplemental briefing from the parties addressed to this topic. Having now reconsidered the matter, we are persuaded that the injunction we upheld in *Planned Parenthood I*, *supra*, 7 Cal.4th 860, is equally valid under the new standard set forth in *Madsen*. We therefore reaffirm the judgment in favor of Planned Parenthood.

I.

The facts are set forth in full in *Planned Parenthood I*, *supra*, 7 Cal.4th 860 and will be repeated here only insofar as they are relevant to the remand.

Planned Parenthood operates a family planning clinic in Vallejo. The clinic provides a range of family planning and health services, including abortions. The clinic is located in a one-story building. The entrance to the clinic is on the side of the building adjacent to a parking lot. There is a concrete yard for additional parking immediately in the front of the building, and a narrow public sidewalk between the yard and the street. The sidewalk is punctuated by two driveways into the parking lot. (*Planned Parenthood I*, *supra*, 7 Cal.4th at p. 865.)

Beginning in March 1990, petitioners began gathering at the clinic, primarily on Thursdays when abortions were performed, to picket and demonstrate against abortions. Although their numbers varied, there were usually six to eight demonstrators at any given time, and occasionally as many as one hundred. Petitioners picketed on the public sidewalk in front of the clinic as well as in the parking lot. One of the tactics of the sidewalk picketers

was to walk slowly across the driveway entrance, thereby delaying cars attempting to turn into the parking lot from the street. Demonstrators would then approach the car and attempt to pass literature through the windows. Other protesters pursued patients walking from their cars to the clinic entrance, as well as along the sidewalk and across the street to the bus stop, offering "sidewalk counseling." Such "counseling" consisted of pressing anti-abortion literature and plastic replicas of fetuses on patients attempting to enter the clinic and exhorting them to reconsider their decision to have an abortion. Petitioners also stationed several sidewalk "counselors" directly outside the clinic entrance for the same purpose. (*Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 865-866.) A witness for petitioners testified that picketing on the sidewalk in front of the clinic was impractical because the sidewalk crossed both driveways; thus, even a few picketers "would impede traffic on Broadway, being a busy street, [and] would probably cause traffic accidents."

In response to Planned Parenthood's complaint for injunctive relief, the trial court initially issued in August 1990 a temporary restraining order enjoining petitioners from harassing any person entering or leaving the building and limiting their picketing to the sidewalk in front of the building. Following a hearing in September, the court granted a preliminary injunction limiting to four the number of pickets that petitioners could maintain on the sidewalk and restricting their proximity to one another. Trial on the complaint for a permanent injunction was held in April 1992. Testimony was received from Janice Schoenfeld, the Escort Coordinator for the clinic, who stated that the demonstrators had generally complied with the preliminary injunction "except for picketers." Marsha Anderson, the clinic director, testified that she had been forced to call the police to enforce the preliminary injunction, "'to hand it out to people who were on the sidewalk and were about to break the rules,'" or breaking the rules. (*Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 866-867, fn. 2.) The clinic was compelled

to employ "escorts" to help patients enter and leave the clinic without being physically accosted by demonstrators.

Following trial, the court made findings that petitioners had: (1) confronted and intimidated women seeking the clinic's services and forced plastic replicas of fetuses and "counseling" upon the clinic's patients and staff; (2) interfered with or obstructed entrance to and exit from the clinic; (3) pursued patients to their cars and public transportation to distribute literature and plastic fetuses; and (4) caused some of the women seeking medical services to become emotionally distraught. Based on these findings, the trial court granted a permanent injunction against petitioners. Among other provisions, the injunction restricted their picketing, demonstrating and counseling activities to the public sidewalk across the street from the clinic. (*Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 866–867.)

Although the Court of Appeal invalidated certain other provisions of the injunction, it sustained the place restriction, concluding that it served a substantial governmental interest in safeguarding a woman's fundamental right to procreative choice under article I, section 1, of the California Constitution, and was narrowly tailored to serve that end. (*Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 867–868.)

We granted review and affirmed the judgment of the Court of Appeal, but on slightly different grounds. We applied what was then the settled four-part test to determine the constitutional validity of a time, place, and manner restriction limiting such speech activities as picketing and leafleting in a public forum. (*See Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791; *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.) Under that standard, the first issue to be determined is whether the restriction is content neutral, that is, whether it regulates "without reference to the content of the regulated speech." (*Va. Pharmacy Bd. v. Va. Citizens Consumer Council* (1976) 425 U.S. 748, 771.) We concluded that the place restriction was content neutral, ob-

serving that it made no reference to petitioners' viewpoint, but focused exclusively on the location and manner of their protest activities. (*Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 869–871.) Petitioners' contention that the injunction was content based because it was impelled by, and directed exclusively against, their anti-abortion activities was similarly rejected. As we explained, the injunction was properly confined to petitioners as "they were the only ones found to have harassed clinic patients and staff." (*Id.* at p. 870.) It was not their point of view, but their harassing and confrontational conduct that impelled the restriction. "Indeed, a similar injunction might just as readily apply to pro-choice demonstrators or to any other disruptive protest in close . . . proximity to the clinic." (*Id.* at p. 871.)

We next considered whether the restriction served a significant governmental interest, and concluded that the buffer zone was amply justified by the significant state interest in preserving the health and safety of patients entering and leaving a medical facility for purposes of receiving treatment, including clinical abortions. As we observed, "the government 'may properly assert *important interests in safeguarding health*' and 'in maintaining medical standards' in the performance of abortions. [Citation.] The state has a 'legitimate interest in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that *insure maximum safety for the patient*.'" (*Planned Parenthood I*, *supra*, 7 Cal.4th at p. 873, quoting *Roe v. Wade* (1973) 410 U.S. 113, 150, italics added.)

In this regard, we noted the substantial line of authority approving the imposition of reasonable buffer zones around family planning clinics to prevent health-threatening physical confrontations with, and intimidation of, patients entering and leaving the facilities. (*Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 874–875, 877.) The record and the trial court's findings plainly indicated that this was one of the primary purposes of the place restriction, "to constrain petitioners' confrontational tactics and thereby limit

the physical intimidation of, and resulting emotional trauma to, the clinic's patients." (*Id.* at p. 875.)

We next examined the injunction to determine whether it was sufficiently narrowly tailored to achieve the expressed governmental interests. We concluded that the buffer zone was necessary to ameliorate the health and safety threat posed by petitioners' aggressive, confrontational tactics, and that lesser means, such as limiting the number of protesters on the sidewalk, would not have accomplished this end. "[T]he state's interest in protecting the patients required the preclusion of face-to-face, physical confrontations with the protesters." (*Planned Parenthood I*, *supra*, 7 Cal.4th at p. 879, fn. 10.)

Finally, we concluded that the injunction left petitioners adequate alternative avenues of communication, observing that the site across the street afforded them a vantage from which to picket and leaflet that was "reasonably close to the clinic and, judging from the photographic exhibits in the record, within plain view of their target audience, the clinic patients and staff." (*Planned Parenthood I*, *supra*, 7 Cal.4th at p. 880–881.) Nothing indicated that their signs would not be clearly visible or that their presence and views would not be readily perceived by persons entering and leaving the clinic. (*Ibid.*)

We thus held that the buffer zone satisfied all of the relevant constitutional criteria, and affirmed the judgment of the Court of Appeal.

II.

To reconsider our decision in light of *Madsen*, as directed by the high court, necessarily requires a review of the court's opinion in that case in some detail.

In *Madsen*, the respondent, an abortion clinic located on a public street called "Dixie Way" in Melbourne, Florida, sought and obtained an injunction against the petitioners, anti-abortion protesters who had picketed and demonstrated outside the clinic.

The initial injunction permanently enjoined petitioners from blocking or interfering with access to the clinic or from physically abusing persons entering or leaving the clinic. Six months later, the trial court issued a broader injunction in response to respondent's allegations that "access to the clinic [for some women] was still impeded by petitioners' activities and that such activities . . . had deleterious physical effects on others." (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2521].) The number of protesters outside the clinic varied from day to day, ranging from a handful to 400. (*Ibid.*) The evidence showed, and the trial court found, that as traffic attempted to turn from Dixie Way into the clinic, protesters would force them to slow and attempt to pass anti-abortion literature to the occupants; that patients and staff would be followed in a stalking manner, giving such persons a feeling of great apprehension; and that "as a result of having to run such a gauntlet to enter the clinic, the patients 'manifested a higher level of anxiety and hypertension. . . .'" (*Ibid.*; see *Operation Rescue v. Women's Health Center* (Fla. 1993) 626 So.2d 664, 667–669 [setting forth the full text of the trial court's findings].)

This and other evidence led the state trial court to conclude that its original injunction was insufficient to "'protect the health, safety and rights of women . . . seeking access to [medical and counseling] services.'" (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2521].) Accordingly, the trial court expanded the injunction by providing that the protesters were prohibited from entering the clinic's premises; blocking access to the clinic; congregating, picketing, patrolling, demonstrating or entering within 36 feet of the property line of the clinic, thereby effectively forcing the petitioners to the other side of Dixie Way; singing, chanting, shouting or employing sound amplification equipment or images observable to or within earshot of patients during business hours; approaching physically within 300 feet of the clinic any person seeking the services of the clinic unless such person indicated a desire to communicate by approaching or by inquiring of the petitioners; and physically abusing, intimidating, harassing, crowding or assaulting

patients, owners or staff of the clinic. (*Id.* at pp. ____ [114 S.Ct. at pp. 2521-2522].) The injunction also included restrictions on similar activities within 300 feet of the residence of any owner, staff member, or employee of the clinic. (*Ibid.*)

The Supreme Court of Florida upheld all portions of the expanded injunction against a free speech challenge. (*Operation Rescue v. Women's Health Center*, *supra*, 626 So.2d at pp. 675-676.)

After granting certiorari (510 U.S. ____ [114 S.Ct. 907]), the United States Supreme Court upheld certain provisions of the injunction and struck down others. First, the high court determined that the injunction was content neutral, rejecting the petitioners' assertion that because it restricted only the activities of anti-abortion protesters the injunction was necessarily content based. As the court explained, an injunction "by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. . . . [¶] The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion . . . There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioners' message." (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2523].)

The high court then observed that if the underlying action had involved a generally applicable statute, instead of an injunction, it would proceed to assess its constitutionality under the standard set forth *Ward v. Rock Against Racism*, *supra*, 491 U.S. 781, 791, to wit, whether the time, place and manner regulation "'was narrowly tailored to serve a significant governmental interest.'" (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2524].) However, citing certain differences between injunctions and generally applicable statutes, the court concluded that a different standard was required. Injunctions, the court observed, "carry greater risks of

censorship and discriminatory application than do general ordinances" and represent judicial remedies tailored to specific circumstances rather than "a legislative choice regarding the promotion of particular societal interests." (*Ibid.*) These differences, the *Madsen* court determined, "require a somewhat more stringent application of general First Amendment principles. . . ." (*Ibid.*) Accordingly, the court held that the test to be applied in evaluating a content-neutral injunction should be "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (*Id.* at p. ____ [114 S.Ct. at p. 2525].)

Applying this test to the Florida clinic restrictions, the high court agreed with the Florida Supreme Court's conclusion that the state's "strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy," ensuring "safety and order," and "promoting the free flow of traffic on public streets and sidewalks" was more than sufficient to justify an appropriately tailored injunction. (512 U.S. ____ [114 S.Ct. at p. 2526].) The court then turned to whether the specific restrictions imposed on the petitioners' activities burdened no more speech than necessary to achieve those goals.

The high court first held that the 36-foot buffer zone represented a valid means of "protecting unfettered access to and egress from the clinic, and ensuring that petitioners do not block traffic on Dixie Way." (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2527].) The court found significant in this regard the fact that the protesters were involved in highly "focused" picketing "directed primarily at patients and staff of the clinic." (*Ibid.*) The court noted that it had long distinguished "between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation." (*Ibid.*)

The Supreme Court also recognized that the trial court appeared to have had few other practical options "given the narrow confines

around the clinic" (512 U.S. ____ [114 S.Ct. at p. 2527]), and noted that the trial court "was convinced that allowing the petitioners to remain on the clinic's sidewalk was not a viable option in view of the failure of the first injunction to protect access." (*Ibid.*) Although the high court acknowledged that the need for a complete buffer zone might be "debatable," it held that "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." (*Ibid.*) The court also noted that the buffer zone was narrow enough that protesters across the street could still "be seen and heard from the clinic parking lots." (*Ibid.*) Thus, the high court concluded that the buffer zone burdened "no more speech than necessary to accomplish the governmental interest at stake." (*Ibid.*)

The *Madsen* court also upheld the limited noise restrictions around the clinic, citing the state's strong interest in maintaining a relatively tranquil environment outside a medical facility "during surgery and recovery periods." (512 U.S. ____ [114 S.Ct. at p. 2528].) As the court observed, the "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." (*Ibid.*) Thus, the court held that the restrictions burdened no more speech than necessary to "ensure the health and well-being of the patients at the clinic." (*Ibid.*)

The high court then proceeded to strike down several other provisions of the injunction, notably that portion of the 36-foot buffer zone that included certain private property abutting the clinic, and the ban on all "images observable" to patients inside the clinic. The court concluded that neither restriction appeared necessary to protect either access to the clinic or patient health and safety. (512 U.S. ____ [114 S.Ct. at pp. 2528-2529].) The court also found impermissible the ban on all uninvited approaches to patients within 100 yards of the clinic, observing that it was broader "than is necessary to prevent intimidation and to ensure access to the clinic." (*Id.* at p. ____ [114 S.Ct. at p. 2529].) Similarly,

the high court found that the 100-yard buffer zone around the residences of clinic owners and staff was unnecessarily large, and observed that a "smaller zone could have accomplished the desired result." (*Id.* at p. ____ [114 S.Ct. at p. 2530].)

Finally, the high court summarily rejected vagueness, overbreadth, and freedom-of-association challenges to the injunction. (512 U.S. ____ [114 S.Ct. at p. 2530].)[1]

III.

We turn now to the question whether the injunction that we upheld in *Planned Parenthood I*, *supra*, 7 Cal.4th 860, remains valid under *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516].

A. The Place Restrictions Are Content Neutral

As to the threshold issue of content neutrality, we note that our analysis in *Planned Parenthood I*, *supra*, 7 Cal.4th 860 is entirely consistent with the high court's reasoning and conclusion in *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516]. There, as here, the injunction was issued in response to petitioners' *physical* harassment and intimidation of clinic patients. There, as here, the injunction was impelled solely by the petitioners' course of conduct, not by the content of their speech. Neither injunction made any reference whatsoever to petitioners' anti-abortion viewpoint. Thus, the *Madsen* court's conclusion that the buffer zone was content neutral fully comports with our like conclusion in *Planned Parenthood I*, *supra*, 7 Cal.4th at page 871. The petitioners' assertion that an injunction directed exclusively against a particular ideolog-

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[1] We note that three Justices would have found the injunction to be content based and thus would have applied a strict-scrutiny standard to determine its constitutional validity. (512 U.S. ____, ____ [114 S.Ct. at pp. 2537-2540] (conc. & dis. opn. of Scalia, J., joined by Kennedy and Thomas, JJ.) Another justice would have adopted a less, rather than a more, stringent standard for assessing whether an injunction survives a free speech challenge. (*Id.* at pp. ____ [114 S.Ct. at pp. 2531-2534] (conc. & dis. opn. of Stevens, J.).)

ical group is necessarily content based, was rejected as spurious in each case. (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2524]; *Planned Parenthood I*, *supra*, 7 Cal.4th at p. 870.)

Petitioners also reassert the argument, raised and rejected in *Planned Parenthood I*, *supra*, 7 Cal.4th 860, that a buffer zone justified in part on sheltering patients from the "emotional impact" of anti-abortion speech is necessarily content based. Once again, petitioners misapprehend the basis of the place restriction at issue. The purpose of the injunction, as the trial court made plain, was to ameliorate the confrontational tactics of petitioners and to prevent the physical intimidation that resulted in higher stress and anxiety. The target was thus petitioners' *physical* tactics, not their anti-abortion message. As we explained, "a similar injunction might just as readily apply to pro-choice demonstrators or to any other disruptive protest in close physical proximity to the clinic." (*Planned Parenthood I*, *supra*, 7 Cal.4th at p. 871.)

B. Significant State Interests Support A Limited Buffer Zone

As to the nature and purpose of the place restrictions themselves, the holdings in *Planned Parenthood I*, *supra*, 7 Cal.4th 860 and *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516], are also consistent. *Madsen* conclusively affirmed the principle which many lower courts—including our own—had previously endorsed, that a narrowly drawn "buffer zone" around a family planning clinic may be justified if it advances significant state interests. The factual parallels between *Madsen* and the case at bar are indeed striking. In both cases, petitioners engaged in highly focused picketing and sidewalk "counseling" directed to patients and staff in various areas in front of the clinic, including the sidewalk and the driveways providing access to the parking lot. (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2521]; *Planned Parenthood I*, *supra*, 7 Cal.4th at p. 866.) In both cases, petitioners *impeded* access to the clinic and blocked traffic by marching across the driveways, causing traffic to slow so that petitioners could approach vehicles and hand literature to the occupants. (*Madsen*, *supra*, 512 U.S. ____

[114 S.Ct. at p. 2521]; *Planned Parenthood I*, *supra*, 7 Cal.4th at p. 866.) In both cases, petitioners physically stalked patients attempting to enter the clinic, causing higher levels of stress and anxiety. (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2521]; *Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 866–867.) In both cases, evidence concerning the petitioners' activities following issuance of the original injunction led the trial court to conclude that a broader restriction was necessary to accomplish its goals. (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2521]; *Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 866–867.) In both cases, the trial court limited the petitioners' activities to the opposite side of the street from the clinic; in *Madsen*, the buffer zone prohibited petitioners from picketing, patrolling, demonstrating or entering within 36 feet of the property line of the clinic, effectively forcing petitioners to "move to the other side of Dixie Way . . ." (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at pp. 2526]); here, the buffer zone limited petitioners' protest activities to the public sidewalk on the opposite side of Broadway. (*Planned Parenthood I*, *supra*, 7 Cal.4th at p. 867.) Although the record provided by the parties does not disclose the precise parameters of the buffer zone thus created, we have taken judicial notice of official maps maintained by the Public Works Department of the City of Vallejo which show the distance across Broadway to be 60 feet.[2] Thus, the two restrictions were essentially equivalent in size and function, the disparity between 36 and 60 feet—or approximately 8 yards—representing a relatively small difference in degree, attributable solely to the differing widths of the streets in question.[3]

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[2] In accordance with Evidence Code section 459, subdivisions (c) and (d), the parties have been given notice and an opportunity to be heard on the issue of judicial notice of the map in question. We find the law to be well settled that trial or reviewing courts may properly notice government maps and surveys. (Evid.Code, §§ 452, subd. (h), 459; *Merritt v. Barta* (1910) 158 Cal. 377, 381; *People v. Southern Pacific Co.* (1918) 177 Cal. 555, 558; *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 745.)

[3] The relevant distance is the 60 feet between the sidewalk in front of the clinic and the sidewalk across the street. As the record and the trial court's

Thus, *Madsen* strongly supports the conclusion that the buffer zone in this case was amply justified by at least two significant governmental interests. First, as we previously held in *Planned Parenthood I*, *supra*, 7 Cal.4th 860, the buffer zone was necessary to ensure "safety and order" in the relatively restricted physical area surrounding the clinic, an interest expressly recognized by the high court as supportive of the place restriction in *Madsen*. (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2526].) Indeed, in upholding the corollary noise restriction imposed by the Florida trial court, the high court observed that the state has a strong interest in maintaining a relatively tranquil environment for patients "during surgery and recovery periods." (*Id.* at p. ____ [114 S.Ct. at p. 2528].) The First Amendment does not, in the high court's words, "demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." (*Ibid.*)

As the high court further recognized, a buffer zone may also be justified as a means of "protecting unfettered access to and egress from the clinic, and ensuring that petitioners do not block traffic. . . ." (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2527].) Although this was not cited as a basis for upholding the injunction in *Planned Parenthood I*, *supra*, 7 Cal.4th 860, since the state's interest in protecting the patients' health and safety was deemed to be a sufficient interest to uphold the place restriction, the parallels with *Madsen* in this regard cannot be overlooked. There, as here, the close physical confines of the area surrounding the clinic limited the trial court's options. The evidence here disclosed that the sidewalk in front of the clinic is quite short and punctuated by two driveways, so that even one or two picketers could effectively block pedestrian or vehicular traffic. Indeed, there was evidence that the more limited preliminary injunction had not been complied with, and the trial court found that petitioners had, in fact, interfered with and obstructed entrance to and exit from the clinic. (*Planned*

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findings make clear, the sidewalk in front of the clinic is the site where most of petitioners' target audience—the clinic patients and staff—had been approached as they entered and left the clinic either on foot or in their vehicles.

Parenthood I, *supra*, 7 Cal.4th at p. 867.) The buffer zone was thus the only practicable means of ensuring unfettered access.

In sum, therefore, we find that *Madsen* provides compelling reinforcement of our earlier conclusion that the buffer zone in this case was amply warranted by the facts and the governmental interests at stake.

Petitioners' arguments to the contrary are unpersuasive. They would have us read *Madsen* for the proposition that a limited buffer zone is permissible *only* where the record reveals that patients have been physically *prevented* from gaining access to a medical facility. Since nothing in the record here reveals that any woman was ever physically denied access, petitioners contend that *Madsen* is critically distinguishable from the case at bar, and affirmatively invalidates the instant injunction.

Petitioners misread *Madsen* in several respects. First, petitioners are incorrect in asserting that *Madsen* requires proof that patients have been denied access to medical attention. The Florida trial court in *Madsen* determined that the petitioners had significantly "interfered" with access to and egress from the clinic by means of a number of harassing tactics, and that several women had initially turned away only to return at a later date. There was no finding, however, that any woman had been physically denied access to the clinic or medical attention. (*Operation Rescue v. Women's Health Center*, *supra*, 626 So.2d at pp. 666–669.) The United States Supreme Court held, in turn, that the 36-foot buffer zone was necessary to protect "unfettered" access to and egress from the clinic. (512 U.S. at P. ____ [114 S.Ct. at p. 2527].)

Thus, contrary to petitioners' assertion, *Madsen* does not require evidence that patients have been physically barred from obtaining medical treatment as a precondition to the establishment of a limited buffer zone. It is sufficient, as the trial court found here, that petitioners had significantly blocked driveways, surrounded patients' cars, and stalked and obstructed patients walking to and from their cars and public transportation, and had thereby sig-

nificantly "interfered" with clinic access. (*Planned Parenthood I*, *supra*, 7 Cal.4th at p. 867.)

Nor, as petitioners urge, does *Madsen* undermine this court's conclusion in *Planned Parenthood I*, *supra*, 7 Cal.4th 860, that the buffer zone was justified by the state's interest in protecting the health and safety of medical patients, particularly those about to undergo surgery with all the physical and emotional strains and medical risks attendant thereto. Indeed, in upholding the noise provisions of the injunction in *Madsen*, the high court relied on the same precedents that we cited in *Planned Parenthood I*, *supra*, 7 Cal.4th at page 873 (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 116; *Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483, 509 (conc. opn. of Blackmun, J.); *NLRB v. Baptist Hospital, Inc.* (1979) 442 U.S. 773) for the principle that "[t]he nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable.'" (*Grayned v. City of Rockford*, *supra*, 408 U.S. at p. 116, fn. omitted; *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2528].) Recognizing the "emotional strain and worry" that naturally afflict patients entering and leaving medical facilities, particularly "during surgery and recovery periods" (512 U.S. ____ [114 S.Ct. at p. 2528]), the *Madsen* court held that the restriction was necessary "to ensure the health and well-being of the patients at the clinic." (*Ibid.*)

The high court's reasoning applies with equal force here, where physical confrontations with protesters moments before receiving medical treatment, including surgical procedures, subjected patients to heightened stress and anxiety. The state's recognized interest in protecting the "health and well being of the patients" at the clinic (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2528]) represents a sufficiently important interest to justify the limited buffer zone imposed by the trial court in this case.

C. The Buffer Zone Burdened No More Speech Than Necessary

Finally, we consider whether the buffer zone satisfies the "somewhat more stringent" (512 U.S. ____ [114 S.Ct. at p. 2524]) test articulated by the high court in *Madsen*, i.e., did it "burden no more speech than necessary" to accomplish the state's interests? (*Id.* at p. ____ [114 S.Ct. at p. 2525].) We conclude, on balance, that the restriction more than meets this heightened standard.

The physical layout of the clinic and its environs included relatively short narrow sidewalks in front of the clinic, punctuated by two driveways into the clinic parking lot. The evidence established that one or two pickets could effectively block passage along the sidewalk and impede traffic. In its preliminary injunction the trial court had allowed four interspersed picketers to remain on the sidewalk in front of the clinic. However, the evidence at trial indicated that picketers had not followed the preliminary injunction and the clinic director stated that police had been called "'to issue the injunction a couple of times . . . to people who were on the sidewalk and were about to break the rules,'" or breaking the rules. (*Planned Parenthood I*, *supra*, 7 Cal.4th at pp. 866–867, fn. 2.) The court also heard testimony that petitioners had physically followed and surrounded patients, interfered with clinic access, and caused heightened stress and anxiety in clinic patients.

The trial court was thus required to craft an injunction that more effectively protected the state's interests in protecting unimpeded access to the clinic and the well-being of clinic patients, while simultaneously preserving petitioners' right to communicate their message to clinic patients and staff. A less restrictive alternative had been tried and found wanting. A minimal buffer zone was clearly a reasonable and necessary means of ameliorating the confrontational tactics of petitioners. The site across the street was in plain view of persons entering and leaving the clinic and afforded petitioners a reasonable vantage from which to communicate their viewpoint without subjecting patients to physical intimidation. On balance, therefore, we hold that the buffer zone burdened no more

speech than necessary to accomplish the governmental interests at stake. (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2527].)

Although petitioners contend otherwise, *Madsen* fully supports this conclusion. There, as here, the trial court was confronted with a relatively restricted geographic area in front of the family planning clinic, physical harassment of patients occurring within these narrow confines, and an earlier injunction that had not proved to be successful. The high court held that, in these circumstances, a 36-foot buffer zone ensuring unimpeded access to the clinic by restricting petitioners to the opposite side of the street was amply justified. As summarized above, the facts here similarly justified a limited buffer zone to ensure patient access and prevent intimidation.

Petitioners also contend that the buffer zone cannot be upheld as necessary to preclude health-threatening physical confrontations between patients and protesters without running afoul of *Madsen*'s separate holding that the 100-yard "no approach" zone in that case was invalid. To recall, the Florida court, in addition to prohibiting protesters from entering anywhere within 36-feet of the clinic, also ordered petitioners to refrain from physically approaching any patient within 100 yards of the clinic unless such person indicated a desire to communicate. (*Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2522].) The high court held that this "no approach zone" was overbroad, since it appeared to forbid contact within an exceptionally large geographic area without sufficient evidence of its necessity. As the high court observed, "it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." (*Id.* at p. ____ [114 S.Ct. at p. 2529].) In contrast, the evidence here amply supported the conclusion that a buffer zone of some 60 feet, like the analogous 36-foot zone in *Madsen*, was necessary to "prevent intimidation and to ensure access to the clinic." (*Ibid.*) Nothing in *Madsen* undermines this conclusion.

Finally, our conclusion in *Planned Parenthood I*, *supra*, 7 Cal.4th at pages 880–881, that the injunction leaves petitioners adequate

alternative means of reaching their target audience remains unchanged in light of *Madsen*. From their vantage across the street petitioners may convey their anti-abortion message to clinic patients and staff, without obstructing access to the clinic or physically intimidating patients in the process.[4]

CONCLUSION

The place restriction upheld by this court in *Planned Parenthood I*, *supra*, 7 Cal.4th 860, fully comports with the holding of the United States Supreme Court in *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516]. Accordingly, we reaffirm the judgment of the Court of Appeal.

ARABIAN, J.

WE CONCUR:

LUCAS, C.J.

MOSK, J.

BAXTER, J.

GEORGE, J.

STRANKMAN, J.*

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[4] Petitioners also rely on a recent federal decision, *Pro-Choice Network v. Schenck* (2d Cir. 1994) 34 F.3d 130, in which the court held that the record evidence did not support imposition of a buffer zone outside a woman's health clinic. That decision has been withdrawn, however, pending rehearing in bank.

* Hon. Gary E. Strankman, Presiding Justice, Court of Appeal, First District, Division 1, assigned by the Acting Chairperson of the Judicial Council.

DISSENTING OPINION BY KENNARD, J.

The trial court issued a sweeping permanent injunction prohibiting anti-abortion protesters from picketing on the public sidewalk in front of a health clinic at which abortions are performed. The only issue before this court is whether the injunction improperly restricted the protesters' right of free expression, in violation of the First Amendment to the United States Constitution.

This is the second time that we have addressed the validity of the injunction. Originally, a majority of this court held the injunction to be constitutional. (*Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal.4th 860, hereafter *Planned Parenthood I.*) I disagreed. Thereafter, the United States Supreme Court granted certiorari, vacated the judgment, and directed this court to reconsider the matter in light of the high court's recent decision in *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. ____ [114 S.Ct. 2516] (hereafter *Madsen*), which set forth the constitutional limitations on the power of a trial court to enjoin anti-abortion picketing in front of a clinic.

Again, a majority of this court holds that the trial court's injunction does not violate the First Amendment. Again, I dissent. In my view, the trial court's injunction violates the principles set forth in *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516], in two respects.

First, *Madsen* permits the trial court to erect "buffer zones" (defined areas in which protesting or picketing is restricted or prohibited) in front of clinics at which abortions are performed *only* when "necessary to serve a significant government interest." (*Madsen*, *supra*, 512 U.S. at p. ____ [114 S.Ct. at p. 2525].) In this case, the trial court's broad permanent injunction was unnecessary, because previously a more narrow preliminary injunction had been effective in protecting the health and safety of the clinic's patients, in providing unimpeded public access to the clinic's facilities, and in ensuring the free flow of traffic on the street and sidewalk in front of the clinic.

Second, *Madsen* requires that injunctions creating "buffer zones" in front of clinics be couched in the narrowest terms that will accomplish the injunction's objective. (*Madsen*, *supra*, 512 U.S. at p. ____ [114 S.Ct. at p. 2526].) But in this case, the permanent injunction is much broader than necessary to accomplish its objective because it defines an area that is the reverse of what the United States Supreme Court meant by the term "buffer zone." A buffer zone, as I just explained, is a carefully defined and narrowly circumscribed area in which expressive conduct such as picketing or leafleting is restricted or prohibited by court order. The injunction here stands this concept on its head by defining a small area and then decreeing that expressive activities may take place *only* in that demarcated space, thereby prohibiting such activities in an undefined and potentially infinite area outside the designated zone. An injunction in this form—walling speech *in* rather than *out*—is altogether different from the injunction involved in *Madsen*. Whether the First Amendment ever permits expressive activity to be caged and confined by such a reverse buffer zone is a novel question; certainly, such a drastic curtailment of speech cannot be constitutionally justified on the facts shown here.

The picketers in this case sought to express views that undoubtedly were disturbing or offensive to the clinic's patients and employees. But, as the United States Supreme Court has observed, to warrant First Amendment protection "the communication need not meet standards of acceptability." (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419.) Thus, under our system of government we may not prohibit the dissemination of views simply because they are controversial, distasteful, or disturbing. To sanction such a prohibition "would be a complete repudiation of the philosophy of the Bill of Rights." (*Murdock v. Pennsylvania* (1943) 319 U.S. 105, 116.)

I

Ordinarily, an appellate court's review of a trial court's factual findings is limited to determining whether the record of the trial contains substantial evidence to support them. (*Ford & Vlahos v. ITT Commercial Finance Corp.* (1994) 8 Cal.4th 1220, 1235; *Peery v. Superior Court* (1981) 29 Cal.3d 837, 845.) But in reviewing a trial court's order restricting First Amendment rights, an appellate court has "a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court." (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) ____ U.S. ____, ____, ____ [56 U.S.L.W. 4625, 4628].) The trial court's order may be upheld only when the reviewing court concludes, after independently examining the record, that the judgment "'does not constitute a forbidden intrusion on the field of free expression.'" (*Ibid.*, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 285; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499.)

This heightened standard of review applies in this case, in which the trial court's permanent injunction bans all picketing and leafleting on the public sidewalk in front of the clinic. Picketing and leafleting are expressive activities at the core of the First Amendment. (See, e.g., *Boos v. Barry* (1988) 485 U.S. 312, 318; *United States v. Grace* (1983) 461 U.S. 171, 176–177.) Indeed, "handing out leaflets in the advocacy of a politically controversial viewpoint [] is the essence of First Amendment expression." (*McIntyre v. Ohio Elections Com'n* (1995) 514 U.S. ____, ____ [115 S.Ct. 1511, 1519].) And a public sidewalk is a quintessential public forum, a place traditionally used for exchanging ideas and expressing opinions. (*Frisby v. Schultz* (1988) 487 U.S. 474, 480; *Cornelius v. NAACP Legal Defense & Ed. Fund* (1985) 473 U.S. 788, 802; *Clark v. Burleigh* (1992) 4 Cal.4th 474, 482.) Here, an independent review of the record can lead to only one conclusion: the trial court's permanent injunction banning *all* picketing by anti-abortion protesters on the public sidewalk in front of the clinic

burdens the protesters' right of free expression substantially more than is necessary to achieve any significant government interest.

II

Plaintiff Planned Parenthood's clinic is located in a one-story building in the City of Vallejo; its entrances, as well as the clinic itself, are in the rear of the building. The building is set well back from the sidewalk and the street. In front of the building is a parking area that extends around one side and behind the building. Two driveways intersect the sidewalk, providing clients and staff of the clinic with access to Broadway, a busy four-lane avenue.

On August 8, 1990, Planned Parenthood filed a complaint for injunctive relief in the Superior Court of Solano County. The complaint alleged that beginning in March 1990, defendants (Citizens for Life and its director, Christine Williams) had intimidated and harassed the clinic's staff and patients by accosting people entering and leaving the clinic's parking lot and attempting to force anti-abortion literature on them, and by obstructing the clinic's driveway. The complaint further alleged that defendants had disrupted business at the clinic through nonamplified noise and by gaining or attempting to gain entrance to the clinic's parking lot, grounds, walkway, and offices.

In its complaint, Planned Parenthood asked the trial court to enjoin defendants from engaging in various forms of conduct and speech. *The only issue before this court, however, is the constitutionality of the ban on picketing on the public sidewalk in front of the clinic.* (*Planned Parenthood I, supra*, 7 Cal.4th at p. 868.) In this regard, the complaint did not seek a total ban on picketing: rather, it asked the court to restrict defendants to two pickets. In a declaration attached to the complaint, Janice Schoenfeld (an employee of Planned Parenthood) stated: "One picket could stand on one of the sidewalks, and one on the other side of the driveway in safety in order to get their message across. All people going into the clinic would have to pass their signs. Their viewpoint

would be clear to passers-by on Broadway [the clinic's location]." Schoenfeld urged the court "to regulate the pickets by ordering that two only, no children, may stand on the public sidewalk." A second declaration, by Karen Ryer (an attorney representing Planned Parenthood) contained a similar request: "There are two sections of sidewalk in front of the building, ideal for pickets. However, the sidewalks are small, and only one picket could occupy each section. Otherwise, they could risk being hit by cars turning into the parking lot from a very busy Broadway Avenue."

On August 8, 1990, the day on which Planned Parenthood filed its complaint, the trial court issued a temporary restraining order pending consideration of preliminary and permanent injunctions. The order, prepared for the trial court's signature by Planned Parenthood, permitted defendants two pickets on the public sidewalk in front of the clinic.

On September 12, 1990, the court held a hearing on Planned Parenthood's request for a preliminary injunction. Two witnesses testified at the hearing: Janice Schoenfeld, the Planned Parenthood employee whose declaration had been submitted with the complaint, and Jeanette Hammer, an anti-abortion protester.

Schoenfeld described some of the disruptive activities of the protesters, but admitted that she had never asked the police to arrest any protesters and that she had never made a citizen's arrest of any protesters. She stated that the police had come to the site once and admonished the protesters to stay on the sidewalk. She said she had no objection to picketing on the sidewalk in front of the clinic, so long as it did not involve a large number of pickets or blocking of the clinic entrance.

Anti-abortion protester Hammer testified that she had done "counseling" (which Hammer described as approaching people with literature and attempting to engage them in conversation) in the parking lot near the clinic's door. She explained why counseling should be permitted in the parking lot rather than the sidewalk.

On September 19, 1990, a week after the hearing, the trial court issued a preliminary injunction *increasing to four* the number of picketers permitted on the sidewalk in front of the clinic. (The preceding temporary restraining order had allowed only two picketers.) The court restricted "picketing and/or counseling to the public sidewalk in front of the building," and it ordered that "not more than two [of the protesters] shall be less than ten feet from any other picketer or counselor." (Diagram A, attached to this dissenting opinion, depicts the site approximately to scale and shows the restrictions imposed by the preliminary injunction.) The preliminary injunction remained in effect for the next 11 months; the record contains no evidence that defendants ever violated its terms.

On April 18, 1991, Planned Parenthood's application for a permanent injunction was tried to the court. The trial lasted less than four hours and included the testimony of just three witnesses, all called by Planned Parenthood.

Planned Parenthood's first witness was Janice Schoenfeld, the Planned Parenthood employee who had testified at the hearing on the preliminary injunction. Most of her testimony concerned events occurring before the trial court issued its preliminary injunction. With respect to events occurring after the issuance of the preliminary injunction, the record shows only the following exchange:

"Q. [by counsel for Planned Parenthood]: Have you observed picket activity since the injunction?

"A. [by Schoenfeld]: Yes, but they followed the injunction usually, except for picketers.

"[Counsel for Planned Parenthood]: Thank you. I have nothing further. Thank you.

"THE COURT: You say they followed the injunction?

"THE WITNESS: They followed the injunction, yes since the injunction."

The second witness at the trial was Marsha Anderson, the clinic's director. Her testimony was devoted exclusively to the behavior of the protesters before the trial court's preliminary injunction, with the possible exception of one statement that may have concerned activities occurring after the injunction was issued: "I called the police to issue the injunction a couple of times, to hand it out to people who were on the sidewalk and were about to break the rules, or breaking the rules."

The third and final witness at the trial was defendant Christine Williams, the director of defendant Citizens for Life. She testified that Planned Parenthood had called the police in August 1990, when the trial court's temporary restraining order was in effect, but that since the issuance of the preliminary injunction the picketing by the abortion protesters had been lawful.

On August 1, 1991—*four months after the trial on Planned Parenthood's request for a permanent injunction and eleven months after issuance of the preliminary injunction*—the trial court issued a permanent injunction. Even though Planned Parenthood had never asked the trial court to completely prohibit picketing on the sidewalk in front of the clinic, the court ordered that "[a]ll picketing, demonstrating, or counseling at the PLANNED PARENTHOOD building shall *only* take place along the public sidewalk *across the street* from PLANNED PARENTHOOD building." (Italics added; attached as diagram B to my dissent is a drawing of the site approximately to scale showing the extent of the restrictions imposed by the permanent injunction.)

III

The First Amendment to the federal Constitution prohibits government action abridging freedom of speech and assembly. The right to freely express one's beliefs or ideas, unpopular as they may be, is essential to "nearly every other form of freedom." (*Palko v. Connecticut* (1937) 302 U.S. 319, 327.) "Full and free discussion has indeed been the first article of our faith. We have founded our

political system on it." (*Dennis v. United States* (1951) 341 U.S. 494, 584.) Our nation's historic vigilance against attempts to curtail the expression of speech "has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality" (*id.* at p. 585) and "sets us apart from totalitarian regimes" (*Terminello v. Chicago* (1949) 337 U.S. 1, 4).

Picketing is a time-honored method of protest and persuasion, uniquely suited to conveying targeted, site-specific messages that gain their force from the location and context in which they are displayed. Understandably, it is rarely welcomed by the person or business at which it is directed. Those targeted by picketing have often sought to invoke the broad injunctive powers of the judiciary to prohibit picketers from expressing their views, generally contending that picketing is likely to lead to violence or disruption. Although courts may restrict picketing upon proof that the picketers or their supporters have engaged in repeated acts of violence, intimidation, or physical obstruction, restriction on free speech cannot be justified by speculative predictions of future violence or claims of past violence not supported by substantial evidence. (See *United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 911-912.) Yet there have been times in our history when courts, purportedly acting to avert violent or illegal conduct, have misused their injunctive powers to prohibit even peaceful and orderly picketing by those expressing certain views, as the following discussion illustrates.

The early part of the twentieth century saw the burgeoning unionization of America's labor force. With it came industrial conflict. As workers began striking for better working conditions and higher wages, they encountered fierce opposition from employers who were determined to crush the strikes. The employers turned to the courts, which, receptive to the employers' position, resorted to their broad injunctive powers to prohibit picketing by the strikers. For example, in *Otis Steel Co. v. Local Union No. 218* (C.C.N.D.Ohio 1901) 110 Fed. 698, 700, the court held that picketing by a striking union could be enjoined, regardless of whether

it had been accompanied by violence, because picketing "in its nature leads to disturbance, and has a tendency to intimidate." Similarly, the court in *Atchison, T. & S.F. Ry. Co. v. Gee* (C.C.S.D.Ia., 1905) 139 Fed. 582, 584, explaining why the court's injunctive powers could be used to prohibit picketing by striking workers, stated: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity. . . . When men want to converse or persuade, they do not organize a picket line." (See also, *Amer. Foundries v. Tri-City Council* (1921) 257 U.S. 184, 205, [pointing out that "[t]he name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion."].) Judicial abuse of the injunction became so widespread that both the Democratic and the Republican parties spoke out against it, and proposed "the correction of abuses due to judicial intervention in labor conflicts." (Frankfurter & Greene, The Labor Injunction (1930), p. 1.)

No doubt aware of this background, the high court in *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. at p. 2524], recognized that the broad injunctive powers of the courts are fraught with the "risks of censorship and discriminatory application." Because of these risks, a reviewing court considering whether an injunction has violated the First Amendment must apply a more stringent test than the standard used to evaluate the constitutionality of content-neutral statutes regulating the time, place, and manner of expression. (*Madsen*, *supra*, at p. ____ [114 S.Ct. at p. 2524].)[1] Thus, the pertinent inquiry is whether "the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (*Id.* at p. ____ [114 S.Ct. at p. 2525].) This standard, the court explained, "requires that an injunction be 'couched in the narrowest terms that will accomplish the pin-pointed objective' of the injunction." (*Id.* at p. ____ [114 S.Ct. at p. 2526], quoting *Carroll v. President and Comm'rs of*

[1] When evaluating the constitutionality of statutes regulating time, place, and manner, the test is whether the statute was " 'narrowly tailored to serve a significant governmental interest.' " (*Madsen*, *supra*, 512 U.S. at p. ____ [114 S.Ct. at p. 2524].)

Princess Anne (1968) 393 U.S. 175, 183.) In this case, the permanent injunction fails that test.

In *Madsen*, the trial court issued the injunction only *after a prior less restrictive injunction had failed*, a fact that figured prominently in the high court's decision. (*Madsen*, *supra*, 512 U.S. at pp. ____, ____-____, ____ [114 S.Ct. at pp. 2521, 2523-2524, 2527].)

By contrast, here the permanent injunction's prohibition of all picketing on the public sidewalk in front of the clinic was imposed after a less restrictive injunction had *succeeded*. Shortly after issuing a temporary restraining order permitting *two* picketers on the public sidewalk in front of the clinic, the trial court issued a preliminary injunction *increasing* the permissible number of picketers to *four* on the public sidewalk in front of the clinic. Roughly a year later, the permanent injunction followed, banning all picketing on the sidewalk in front of the clinic, even though Planned Parenthood had not requested this prohibition. Why this total ban? Had the terms of the preliminary injunction been less than completely effective, Planned Parenthood could certainly have been expected to present evidence of specific problems in the 11 months that the preliminary injunction was in force. Indeed, Planned Parenthood, as the plaintiff in the action (see Evid. Code, § 500) and as the party seeking to restrict speech (see *Healy v. James* (1972) 408 U.S. 169, 184-185), was required to do so, and without such a showing this crucial factual issue must be resolved against it (see Evid. Code, § 115). Yet Planned Parenthood offered no such evidence at trial.

According to the majority, the evidence at trial showed that the temporary restraining order and the preliminary injunction failed to safeguard the state's interests in "protecting unimpeded access to the clinic and the well-being of clinic patients. . . ." (Maj. opn., *ante*, 43 Cal.Rptr.2d at 98, [App. 17a].) To support this conclusion, the majority appears to rely on just two sentences of testimony.

I first turn to the majority's statement that "the evidence at trial indicated that picketers had not followed the preliminary injunction. . . ." (Maj. opn., *ante*, 43 Cal.Rptr.2d at 97, [App. 17a].) The only conceivable basis for this assertion is a statement that the clinic's escort coordinator, Janice Schoenfeld, made in response to a question at trial whether she had observed picket activity following issuance of the preliminary injunction: "Yes, but they followed the injunction usually, *except for picketers*." (Italics added.) This cryptic comment does not support the majority's assertion, for three reasons. First, through a subsequent inquiry of Schoenfeld, the trial court clarified that the picketers *had* obeyed the preliminary injunction.[2] Second, even if Schoenfeld's testimony could be construed as suggesting that the picketers had not followed the injunction, her remark is simply a conclusion, unsupported by any specific facts. As such, it is not even competent evidence (see Evid. Code, § 800; *People v. De Santis* (1992) 2 Cal.4th 1198, 1226; *Lombardo v. Santa Monica Young Men's Christian Assn.* (1985) 169 Cal.App.3d 529, 540; *Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 289), much less evidence sufficient to warrant curtailment of the fundamental rights of freedom of speech and assembly guaranteed by the First Amendment to the federal Constitution. Third, even if the majority accurately characterized Schoenfeld's testimony, it still does not support the trial court's prohibition of any picketing on the public sidewalk in front of the clinic. When picketing "has been in general lawful," even though there may have been "infrequent illegal acts not of a serious character," a total ban of picketing is not permitted and "only the unlawful conduct will be enjoined." (*Steiner v. Long Beach Local No. 128* (1942) 19 Cal.2d 676, 684.)

The other fragment of testimony that forms the basis for the majority's conclusion that the preliminary injunction was ineffective is this statement by the clinic's director, Marsha Anderson: "I

[2] Immediately after Schoenfeld's ambiguous statement, the court inquired: "You say they followed the injunction?" Schoenfeld responded: "They followed the injunction, yes since the injunction."

called the police to issue the injunction a couple of times, to hand it out to people who were on the sidewalk and were about to break the rules, or breaking the rules." From this, the majority concludes that Anderson "had been forced to call the police to enforce the preliminary injunction. . . ." (Maj. opn., *ante*, 43 Cal.Rptr.2d at 90, [App. 3a].)

But the record shows that Anderson, when she made the statement at issue, was referring to events occurring *before* the trial court issued the preliminary injunction. Counsel for Planned Parenthood began his questioning of Anderson by asking her to define her duties during March 1990 "*up* to the injunction date . . .," after which he requested her to "describe the incidences that you can remember that occurred during the period of picketing *before the injunction* that occurred at the clinic." (Italics added.) After Anderson had described several incidents in which the protesters had engaged in disruptive behavior, including one occasion on which the clinic had called the police, Planned Parenthood's attorney asked her if she had been forced to call the police on any other occasion. Anderson gave the statement I quoted earlier: "I called the police to issue the injunction a couple of times, to hand it out to people who were on the sidewalk and were about to break the rules, or breaking the rules." Given the context in which Anderson made this statement, it appears that she was referring to episodes occurring *before* the preliminary injunction, and that in using the term "injunction" she probably meant the temporary restraining order that preceded the preliminary injunction. It is hardly surprising that the clinic had to ask the police to issue copies of the temporary restraining order to the protesters, for the order was obtained ex parte and the protesters therefore would not have known of its terms.[3]

[3] The majority states: "The court also heard testimony that petitioners had physically followed and surrounded patients, interfered with clinic access, and caused heightened stress and anxiety in clinic patients" (maj. opn., *ante*, 43 Cal.Rptr.2d at 97, [App. 17a]), implying that this testimony described incidents occurring after the trial court issued its preliminary injunction. To

Even if Anderson's statement could be construed as referring to events occurring *after* issuance of the preliminary injunction, it would not support the trial court's ban of picketing on the sidewalk in front of the clinic. Anderson's testimony is devoid of any specifics that would lead her or anyone else to conclude that the protesters were "about to break the rules, or breaking the rules." Therefore, Anderson's statement, like the sentence fragment from Schoenfeld's testimony so heavily relied upon by the majority, is merely a conclusion unsupported by any facts and thus is not competent evidence, much less evidence sufficient to support the trial court's total prohibition of free speech on the public sidewalk in front of the clinic.[4]

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the contrary, this testimony by Anderson described incidents occurring *before* the court issued its preliminary injunction.

[4] Although the majority cites no other *evidence* to support its conclusion that the preliminary injunction was ineffective, it does assert that "one or two pickets could effectively block passage along the sidewalk and impede traffic." (Maj. opn., *ante*, 43 Cal.Rptr.2d at 97, [App. 17a].) The record contains absolutely no support for this assertion, which I assume to be derived from the testimony of Jeanette Hammer, an anti-abortion protester. But Hammer testified that *sidewalk counseling* of motorists entering the parking lot, not *picketing*, could impede traffic and cause accidents if it were conducted on the sidewalk. The distinction between the two is significant. "Counseling," as Hammer defined it, requires lengthy conversations, and thus could pose a risk of traffic accidents if the subject of the counseling is a driver or passenger in a car turning from a busy street into the clinic's parking lot. Picketing, by contrast, requires no such conversations, and thus would not impede traffic or cause accidents; indeed, sidewalk picketing on busy streets by strikers and others protesting a variety of grievances is commonplace in our society. Thus, Hammer's testimony provides no support for the majority's claim that the record shows picketing to be an impractical, dangerous activity.

Even if one were to accept the majority's mischaracterization of Hammer's testimony, her testimony nonetheless would provide no support for the trial court's order enjoining all picketing from the sidewalk in front of the clinic. Hammer testified at the hearing held before issuance of the preliminary

Even if the trial court had not issued a previous, less restrictive injunction that had successfully protected the state's interests, the preliminary injunction here would violate the First Amendment. As I shall explain, it is substantially broader than the injunction issued in *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516], or in any other case upholding a buffer zone in front of a clinic.

In *Madsen*, the United States Supreme Court upheld a 36-foot "buffer zone" around a health clinic that performed abortions insofar as it applied to activities on the public right-of-way in front of the clinic, but the court invalidated the injunction insofar as it included property to the back and the side of the clinic. (*Madsen*, *supra*, 512 U.S. at pp. ____-____ [114 S.Ct. at pp. 2526-2528].) Here, the trial court ordered that defendants could picket *only* in one place: the sidewalk across the street from the clinic. Thus, the court did not merely create a buffer in front of the clinic: it prohibited defendants from picketing *anywhere* except for the one location specified in the injunction. *Madsen* provides no support for this drastic curtailment of defendants' First Amendment rights.

In *Madsen*, the court held that the 36-foot buffer zone was constitutionally permissible for two reasons. First, the trial court in that case had few other options "in view of the failure of the first

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injunction; she did not, as the majority misleadingly implies (maj. opn., *ante*, 43 Cal.Rptr.2d at 97, [App. 17a]) refer to the period after the preliminary injunction was already in effect. Thus, her testimony provides no support for the trial court's decision to impose restrictions on picketing *greater* than those contained in the preliminary injunction.

In any event, even if Hammer's testimony at the hearing on Planned Parenthood's request for a preliminary injunction could be construed as referring to picketing on the sidewalk being impractical and posing a risk of traffic accidents, the trial court rejected it, because one week after Hammer's testimony it *increased* the number of pickets permitted on the sidewalk in front of the clinic from two to four.

injunction to protect access." (*Madsen*, *supra*, 512 U.S. at p. ____ [114 S.Ct. at p. 2527].) Second, the characteristics of the clinic's site demonstrated that the injunction did not significantly impair the free speech rights of the protesters. On the public right-of-way, the 36-foot buffer zone put the protesters across a narrow, 21-foot wide street, where they were "no greater than 10 to 12 feet from cars approaching and leaving the clinic" and could "still be seen and heard from the clinic parking lots." (*Ibid.*)

Unlike the situation in *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516], the permanent injunction here permits the protesters to picket only in one spot, on the opposite side of the busy four-lane avenue on which the clinic is located. That location is approximately 67 feet (the combined width of the sidewalk and Broadway Avenue) from the edge of the sidewalk in front of the building housing the clinic, 112 feet from the front of the building where the clinic is located, and approximately 172 feet from the entrance to the clinic. (See diagram B.) Thus, the injunction in this case imposes a far greater intrusion on First Amendment rights than the narrow 36-foot buffer in *Madsen*.

In upholding the permanent injunction in this case, the majority notes that *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516], "conclusively affirmed" the principle that buffer zones around clinics may be justified. (Maj. opn., *ante*, 43 Cal.Rptr.2d at 95, [App. 12a].) I have two observations. First, the permanent injunction in this case did not establish a "buffer zone": it did not create an area around the clinic in which picketing was restricted and allow picketing everywhere else; instead, it limited the picketing to a specific area and prohibited picketing in all other locations. (Compare diagram A with diagram B.)

Second, although *Madsen* held that in some circumstances buffer zones are constitutionally permissible, the high court cautioned that any injunction limiting the right of free expression, including those establishing buffer zones, must be "'couched in the narrowest terms that will accomplish the pin-pointed objective' of the

injunction." (*Madsen*, *supra*, 512 U.S. at p. ____ [114 S.Ct. at p. 2526].) *Madsen* itself, and all other decisions in which courts have upheld the validity of buffer zones, have limited the scope of those buffers to minimize their impact on free expression. This has been accomplished by: (1) permitting a small number of protesters within the buffer zone (e.g., *Horizon Health Center v. Felicissimo* (N.J. 1994) 638 A.2d 1260, 1273 ["rather than prohibiting all expressional activities on the sidewalk directly in front of the [clinic], the injunction should have allowed a limited, controlled form of expression near the entrance while restraining the troublesome mass of protesters to a location across the street"]; *Northwest Women's Center, Inc. v. McMonagle* (3d Cir. 1991) 939 F.2d 57, 63–64 [six picketers permitted within buffer zone]; *Fargo Women's Health v. Lambs of Christ* (N.D. 1992) 488 N.W.2d 401, 409 [trial court permitted two picketers; case remanded for further factfinding on whether injunction was overbroad]); or (2) drawing the boundaries of the buffer zone so narrowly that protesters standing outside the clinic could still communicate effectively with persons entering and leaving the clinic (e.g., *Madsen*, *supra*, 512 U.S. at p. ____ [114 S.Ct. at pp. 2527–2528] [36-foot zone narrow enough to place protesters 10 to 12 feet from cars approaching and leaving clinic, thereby retaining protesters' ability to be seen and heard from clinic parking lots]; *Pro-Choice Network v. Project Rescue* (W.D.N.Y. 1992) 799 F.Supp. 1417, 1433–1434 [buffer zone extending only 15 feet from clinic entrances]; *Planned Parenthood v. Holy Angels Catholic Church* (N.D. Cal. 1991) 765 F.Supp. 617, 626 [clear zone of only 25 feet from clinic entrances]; *Bering v. Share* (Wash. 1986) 721 P.2d 918, 929–931 [picketing permitted on sidewalk next to, but not in front of, medical facility]). In contrast, here the permanent injunction is not similarly limited to minimize the impact on defendants' right of free expression; rather, it prohibits *any* picketing in the entire area around the clinic, permitting picketing only in a small area *across* a busy, 4-lane avenue that is 67 feet from the edge of the public sidewalk directly in front of the clinic and approximately 172 feet from its entrance.

To summarize: (1) In *Madsen*, *supra*, 512 U.S. ____ [114 S.Ct. 2516], the United States Supreme Court upheld the trial court's injunction only to the extent that it barred picketing in the right-of-way immediately in front of the clinic; here, the majority approves an injunction that bans picketing *everywhere* except for a narrow, specific location far from the entrance to the clinic. (2) In *Madsen*, the failure of a prior less restrictive injunction demonstrated the need for more restrictive provisions; here, the *success* of the prior less restrictive injunction shows that more stringent restrictions are unnecessary. (3) In *Madsen*, the court permitted picketers to come within 10 to 12 feet of cars approaching and leaving the clinic; here, the protesters can exercise their First Amendment rights only on the other side of an avenue 60 feet wide, at a considerable distance from those entering or leaving the clinic. (4) In *Madsen*, "[p]rotesters standing across the narrow [21 feet wide] street from the clinic [could] still be seen and heard from the clinic parking lots" (512 U.S. at p. ____ [114 S.Ct. at p. 2527]); here, the protesters must make their voices heard over the roar of traffic on the busy four-lane avenue separating them from the clinic.

These differences demonstrate that unlike the injunction the high court upheld in *Madsen*, the permanent injunction here burdens more speech than necessary, thus violating the First Amendment guarantee of free speech. (*Madsen*, *supra*, 512 U.S. at p. ____ [114 S.Ct. at p. 2526].)

CONCLUSION

Everyone is in favor of free speech. We constantly extol its virtues. But to some people the idea of free speech is that they are free to say what they want but those with different views are not. (Speech to House of Commons by Sir Winston Churchill, Oct. 13, 1943, Winston S. Churchill—His Complete Speeches (James edit. 1974) Vol. VII, p. 6861.) The essence of our First Amendment's guarantee of freedom of expression, however, is the

right of anyone to speak out. "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." (*West Virginia Bd. of Ed. v. Barnette* (1943) 319 U.S. 624, 642.) To abridge that right is to abridge liberty.

Here, anti-abortion protesters sought to picket on the public sidewalk in front of the clinic. A public sidewalk is the quintessential public forum for the exercise of First Amendment rights. The trial court granted a preliminary injunction limiting to four the number of picketers on the sidewalk. The preliminary injunction remained in effect for 11 months, a period more than sufficient to test its effectiveness in controlling abusive and obstructive conduct by the picketers. There is no evidence in this case that the preliminary injunction was not fully effective in striking a delicate balance between the constitutional right of a woman to obtain an abortion during the early months of pregnancy and the constitutional right of every person to publicly and peacefully express an opinion.

Abortion protesters are not above the law. When they engage in illegal or disruptive conduct, the judicial system should act swiftly to protect the rights of women seeking the services of any clinic at which abortions are performed. Had the picketers resorted to violence or committed serious and willful violations of the preliminary injunction, I would not for a moment hesitate to affirm an order of the trial court excluding them from the sidewalk in front of the clinic. But there is *no* evidence in the record before this court that after the trial court's issuance of a preliminary injunction the picketing by the protesters was other than peaceful. The protesters were openly engaged in making the public aware of their strongly held belief that the performance of abortions at the clinic was morally wrong. Disturbing as the expressions of protest must have been to the clinic's staff and patients, the very essence of the First Amendment is freedom to express ideas that others may find profoundly unsettling or offensive. All who seek

to protest, no matter what their views, are equally entitled to this protection.[5]

Based on the record in this case, there simply was no need, practically or legally, to banish the picketers to the opposite side of the busy four-lane avenue, and to bar them from peacefully expressing their views on the public sidewalk directly in front of the clinic. Accordingly, the trial court's permanent injunction burdened more speech than was necessary to protect the clinic's staff and patients, and thus violated the First Amendment to the United States Constitution. (*Madsen*, *supra*, 512 U.S. at p. ____ [114 S.Ct. at p. 2526].)

KENNARD, J.

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[5] One cannot help but wonder if the majority would as readily have upheld the trial court's injunction abridging the picketers' right to free speech had the picketers been striking employees of the clinic instead of anti-abortion protesters.

DIAGRAM A

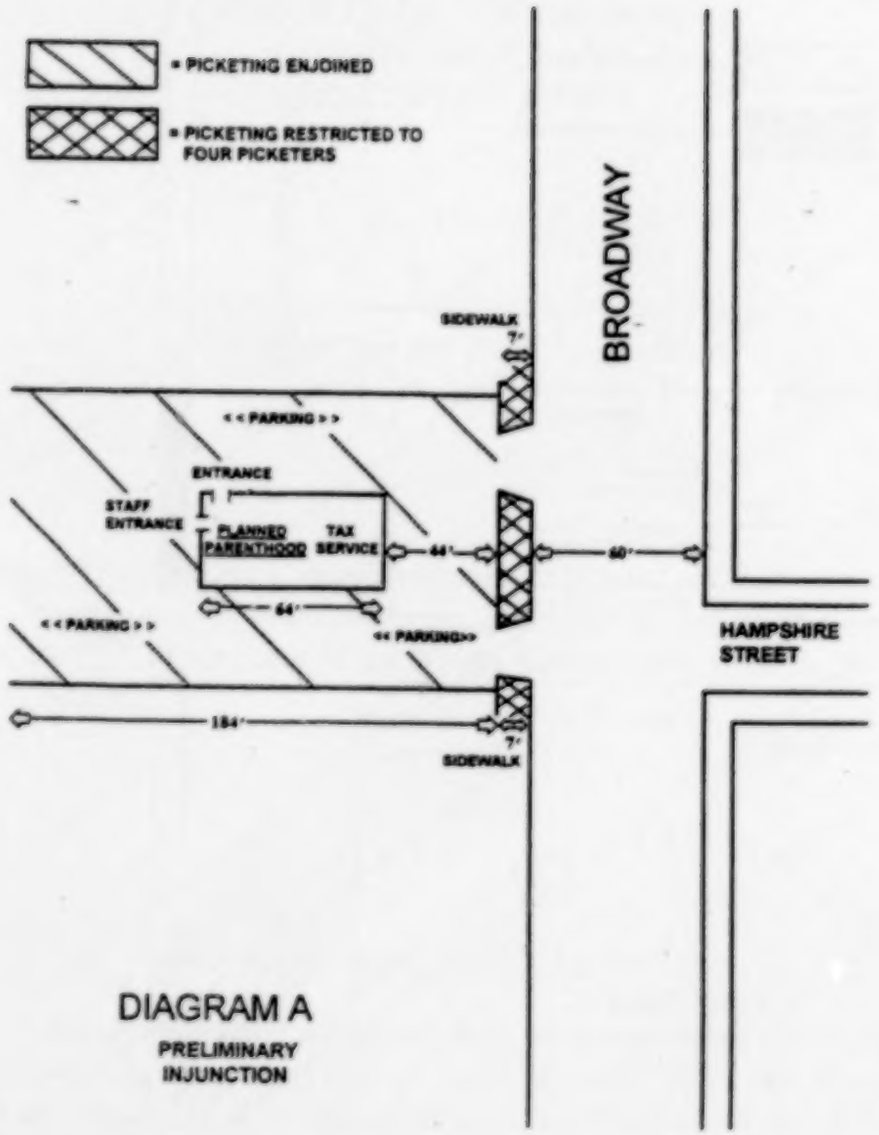
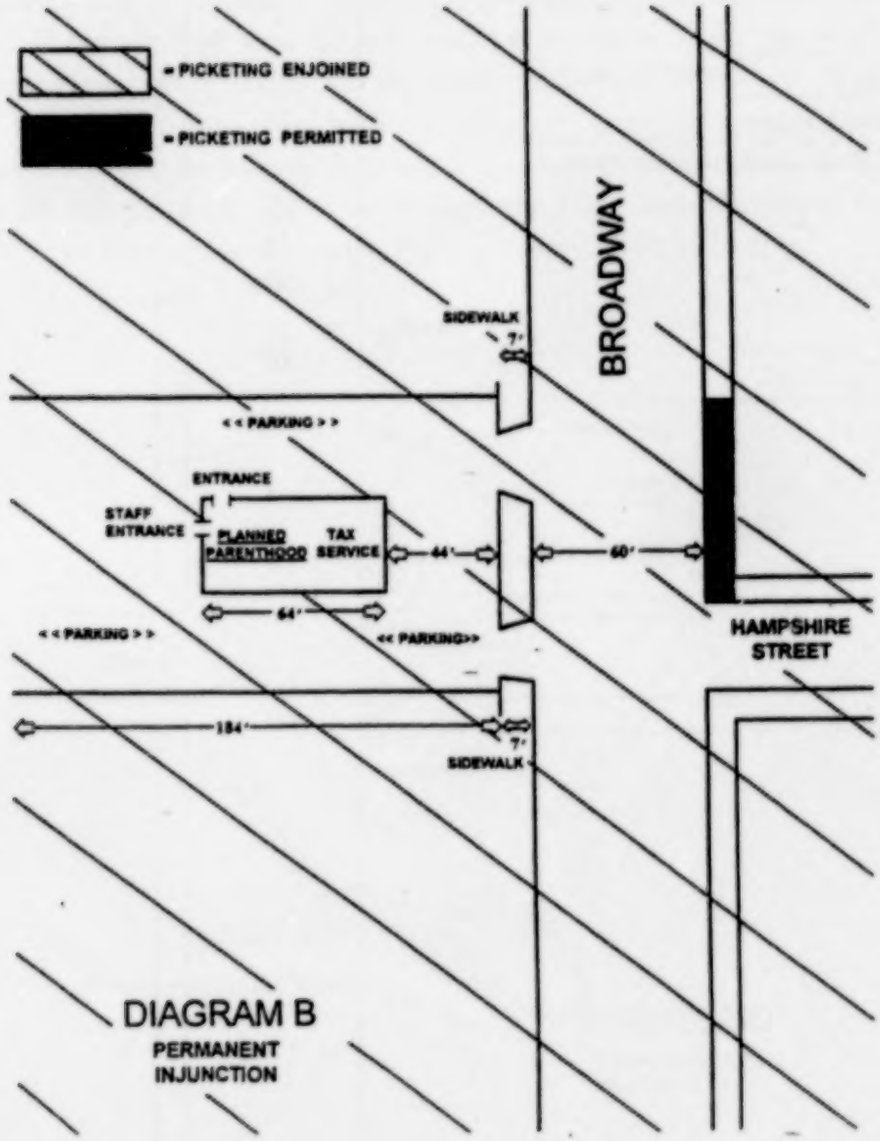


DIAGRAM A

PRELIMINARY INJUNCTION

DIAGRAM B



APPENDIX B

[Filed Aug. 1, 1991]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SOLANO
DEPARTMENT THREE

No. 110090

PLANNED PARENTHOOD SHASTA-DIABLO INC., a California Not For Profit Corporation,

Plaintiff,

vs.

CHRISTINE WILLIAMS, individually, CITIZENS FOR LIFE, BIRTHRIGHT OF VALLEJO, an unknown entity, and THAT CLASS OF PERSONS ACTING IN CONCERT WITH NAMED DEFENDANTS, DOES 1-300, inclusive,

Defendants.

ORDER ON PERMANENT INJUNCTION

The above-entitled application for a permanent injunction came on regularly for a court trial on April 18, 1991 before this court. Karen Anderson Ryer appeared as counsel for plaintiff and John R. Streett appeared as counsel for defendants.

Evidence was thereafter introduced and heard in less than four hours, legal memorandums filed and the matter submitted for decision. A statement of decision was not requested.

THE COURT FINDS:

1. Plaintiff is one of two businesses which lawfully occupies a one story office building located at 990 Broadway, Vallejo, Solano County, California;

2. The parking lot immediately adjacent to and surrounding plaintiff's premises provides parking for its physicians, staff and clients;

3. Broadway, the street immediately in front of plaintiff's premises, is a busy avenue, with light commercial establishments on either side of plaintiff's premises;

4. The sidewalk in front of plaintiff's premises is punctuated with driveways servicing this commercial area;

5. Defendants CHRISTINE WILLIAMS and SOLANO CITIZENS FOR LIFE confront and intimidate women seeking plaintiff's services and force plastic replicas of fetuses and "counseling" upon plaintiff's staff and clients;

6. Plaintiff must escort its clients through picket lines and defendant's "picketers/counselors" in its parking lot.

7. Defendants and their picketers/counselors stand directly in front of plaintiff's office door and interfer with or obstruct entrance to and from plaintiff's clinic;

8. Defendants and their picketers/counselors write down the license plate numbers of plaintiff's staff and clients and photograph them;

9. Defendants and their picketers/counselors have called staff "murderers" or asked them not to "kill babies" in the presence of small children;

10. Defendants and their picketers/counselors have pursued plaintiff's clients to their cars or public transportation in an effort to distribute literature and the plastic fetuses;

11. Defendants and their picketers/counselors conduct these activities on a weekly basis and have had as many as 100 people involved;

12. Defendants and their picketers/counselors bring small children to the area who run up and down the public sidewalk in front of plaintiff's premises;

13. The conduct of defendants and their picketers/counselors have caused some of the women seeking counselling or services from plaintiff to become emotionally distraught.

IT IS ORDERED that defendant CHRISTINE WILLIAMS and SOLANO CITIZENS FOR LIFE and their agents, representatives, employees and members, and each of them, and each and every person acting at the direction of or in combination or in concert with defendants, are permanently restrained as follows:

1. From blocking any entrance or exit to 1990 Broadway, Vallejo, Solano County, California ("PLANNED PARENTHOOD building");

2. From recording license plate numbers of cars entering or leaving the PLANNED PARENTHOOD building;

3. From photographing any persons entering or leaving the PLANNED PARENTHOOD building;

4. From referring, in oral statements while at the picket site, to physicians, staff, or clients as "murdering" or "murderers," "killing" or "killers;" or to children or babies being "killed" or "murdered" by anyone in the PLANNED PARENTHOOD building in the presence of children under the age of 12;

5. From shouting at or touching physicians, staff or patients entering or leaving the PLANNED PARENTHOOD building or making any noise that can be heard inside the premises;

6. From blocking the walkway and obstructing any physician, staff or patient entering or leaving the PLANNED PARENTHOOD building;

7. All picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall only take place along the public sidewalk across the street from the PLANNED PARENTHOOD building.

8. Defendants and their picketers/counselors shall not offer literature or plastic fetuses to any person who has refused such items.

/s/ Dennis Bunting
DENNIS BUNTING
Judge of the Superior Court

APPENDIX C

[Filed Feb. 5, 1993]

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

No. A055117
(Super. Ct. No. 110090
Solano County)

PLANNED PARENTHOOD SHASTA-DIABLO INC.,
Plaintiff and Respondent,

v.

CHRISTINE WILLIAMS, *et al.*,
Defendants and Appellants.

This is an appeal from a final judgment granting a permanent injunction against anti-abortion protesters. The protesters have targeted the staff and clientele of a Planned Parenthood clinic in Vallejo. The evidence established that appellants Christine Williams and members of Citizens for Life have entered private property at the Vallejo clinic to confront and intimidate women seeking abortion services and have also obstructed the entrances to the clinic. In order to protect Planned Parenthood's patients and staff, the trial court imposed place and manner restrictions on appellants' ongoing protest. Appellants have appealed from the judgment imposing the permanent injunction. We affirm in part and reverse in part.

FACTS

Planned Parenthood operates a family planning clinic in Vallejo. The clinic is in a single-story office building which it shares with another tenant, a tax service. There is a parking lot on one side and to the rear of the building; this lot is for the exclusive use of the clinic and tax service. There is a narrow public sidewalk in front of the building which is intersected by two driveway entrances which lead to the building parking lot. The main door to the clinic is toward the rear of the office building, well off the street and public sidewalk.

In March of 1990 appellants and other demonstrators began gathering at the clinic, primarily on Thursdays when abortions were performed. There were often six or more demonstrators and they often brought children. The demonstrators protested by picketing directly in front of the office building on the public sidewalk. Some picketers walked very slowly across the driveway entrance to the clinic parking lot, thus delaying or preventing cars from entering.

As part of their tactics to prevent abortions, the protesters also stationed two "counselors" near the entrance to the clinic building. These "counselors" would approach the clinic's patients as they entered and would offer them anti-abortion literature and plastic fetuses. At times, the "counselors" would tell the patients that they were killing a baby, and admonish them that the Bible condemns abortion. The "counselors" often stood directly in front of the doorway to the clinic, making it difficult to enter or exit. In order to protect their patients from the "counselors," the clinic was forced to employ volunteers to escort the patients from the parking lot to the clinic entrance.

In addition to pressuring the clinic's patients, the protesters also targeted the staff. On at least one occasion, the protesters called a clinic nurse a "murderess" and exhorted her not to "kill" babies. Finally, the protesters photographed the clinic patients and staff and recorded the license numbers of their cars.

Based on this evidence,[1] the trial court granted a permanent injunction against appellants, enjoining them from: (1) blocking any entrance to the clinic building; (2) photographing any person entering or leaving the clinic; (3) recording license plates of cars entering or leaving the clinic; (4) "referring, in oral statements while at the picket site, to physicians, staff, or clients as 'murdering' or 'murderers,' 'killing' or 'killers;' or to children or babies being 'killed' or 'murdered' by anyone in the PLANNED PARENTHOOD building in the presence of children under the age of 12"; and (5) shouting at or touching clinic staff or patients or making any noise that can be heard inside the clinic. Finally, the injunction restricts all picketing, demonstrating and "counseling" to the public sidewalk *across the street* from the clinic.

Appellants have appealed from this judgment.

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[1] In stating the facts in this case, we have relied on the record pertinent to the permanent *and* preliminary injunctions since it appears the trial court based its final decision on the *entire* record before it. Appellants would have us restrict our review of the record to the hearing on the permanent injunction only, and to ignore the record of the preliminary injunction. We decline to do so. First, it appears that the court at least implicitly took judicial notice of its own records (including those pertinent to the preliminary injunction) in rendering the permanent injunction. (Evid.Code, § 452, subd. (d).) Second, appellants have not requested that all of the proceedings below be transcribed and included in the record on appeal. Significantly, the record does not contain transcripts of the closing arguments or of a motion made by defendant at the end of trial. Consequently, on this record, appellants have not carried their burden to affirmatively show error by proving that the trial court did *not* rely on the record of the preliminary hearing in rendering its final decision. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 268, pp. 276–277.)

DISCUSSION

Appellants challenge the injunction to the extent it: (1) excludes them from the clinic parking lot; (2) excludes them from the public sidewalk directly in front of the clinic; and (3) restricts the content of their speech by preventing them from using certain specified language in front of children while at the protest site. We consider each contention separately.

A. Exclusion From the Clinic Parking Lot

1) Standing

The permanent injunction states that "[a]ll picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall *only* take place along the public sidewalk across the street from the PLANNED PARENTHOOD building." This means, of course, that the demonstrators and counselors are enjoined from entering the clinic parking lot and from stationing themselves in front of the clinic entrance.

Appellants contend this place restriction is invalid because the clinic did not show it had a possessory interest in the parking lot adjoining the office building. Consequently, according to appellants, the clinic had no "standing" to exclude the protesters from the parking lot. We disagree.

The trial court found that "[t]he parking lot immediately adjacent to and surrounding [Planned Parenthood's] premises provides parking for its physicians, staff and clients." A declaration introduced at the hearing on the preliminary injunction states that the parking lot "is *solely* for the use of customers and clients of the tax service and Planned Parenthood." (Emphasis supplied.) No contrary evidence was introduced at trial. In our view, this was sufficient to establish the clinic's "possessory interest" in the parking lot, and the court properly concluded that the clinic had standing to enjoin interference with that right.

More important, this court has recently recognized that an operator of a family planning clinic has "interests other than mere ownership" which support a permanent injunction against anti-abortion activities in the clinic's parking lot. Those rights include "'freedom from disruption of normal business operations and freedom from interference with customer convenience. [Citation.]'" (*Allred v. Shawley* (1991) 232 Cal.App.3d 1489, 1502.) These interests furnish an independent basis for standing to bring suit, regardless of the clinic's right to exclusive possession of the parking lot. (See also *Right to Life Advo. v. Aaron Women's Cl.* (Tex.App. 1987) 737 S.W.2d 564, 570–571 [women's clinic had an independent basis for standing to bring suit to enjoin anti-abortion demonstrations in adjoining parking lot, apart from its rights under a lease, since it was a specific target of the demonstrations and had a personal stake in the controversy].)

In short, it is ludicrous to assume that a family planning clinic has no "standing" to enjoin activities which are aimed at disrupting and impeding its lawful business. The clinic's "standing" does not turn on whether it has a sufficient possessory interest in the parking lot, but on whether it has shown the activities in the parking lot have disrupted its normal business operations and have interfered with customer convenience. On this record, there is no question the clinic has met this burden.

2) Public Forum

Appellants next contend that excluding them from the parking lot violates Article 1, section 2 of the California Constitution because the parking lot is a public forum.[2] We disagree.

Appellant's rely on a line of cases culminating in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899. They cite these

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[2] Appellants do not contend that the restriction violates the First Amendment to the United States Constitution, which the United States Supreme Court has construed more narrowly in this context. (*Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662, 1668, 1669, fn. 5.)

cases for the proposition that under the California Constitution the clinic parking lot is a public forum from which the protesters may not be excluded. *Robins* does not control this case. In *Robins* our Supreme Court held that Article 1, section 2 of the California Constitution protects the exercise of nondisruptive free speech and petition rights in a large private shopping mall. The *Robins* court recognized that central business districts have yielded many of their historic functions to the suburban shopping mall, and that such malls are, in essence, public forums. (*Robins*, *supra*, at pp. 907, 910, fn. 5.) The *Robins* court emphasized that the size of the shopping mall is an important factor. (*Id.*, at pp. 902, 910-911.) The court cautioned that "'[i]t bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment.'" (*Id.*, at p. 910.)

Far more relevant to the present case than *Robins* are recent opinions which specifically uphold the exclusion of anti-abortion protesters from clinic parking lots. In *Planned Parenthood v. Wilson*, *supra*, 234 Cal.App.3d 1662, the Fourth District upheld an injunction preventing anti-abortion protesters from entering a clinic parking lot to conduct anti-abortion activities. (*Id.*, at pp. 1666, 1674.) The *Wilson* court distinguished *Robins* on the ground that the retail establishment under consideration there—a three-story medical center housing six tenants—was not similar to the quasi-public forum created by a large suburban shopping center, but was more akin to the "modest retail establishment[s]" specifically excluded from the *Robins* rule. (*Planned Parenthood v. Wilson*, *supra*, at pp. 1671-1672.)

Similarly, in *Allred v. Shawley*, *supra*, 232 Cal.App.3d 1489, the court upheld an injunction banning anti-abortion protesters from the parking lot of a clinic housed in a 14,000 square foot office building containing 10 tenants. (*Id.*, at pp. 1494-1495, 1505.) The court rejected the notion that the parking lot was a public forum, concluding that "the professional center had continually maintained the private character of its parking lot and had not

invited the public *generally* to use the property." (*Id.*, at p. 1502, emphasis supplied.)

Here, the building under consideration is even smaller and more private than those considered in *Wilson* and *Allred*. The clinic contains only two tenants, and the parking lot is reserved for the exclusive use of their employees and clients. The clinic parking lot is not open to "the public generally." Consequently it is not a public forum where appellants are *entitled* to exercise their right to free speech.

B. Exclusion From The Public Sidewalk Directly in Front of The Clinic Building

Again, the permanent injunction states that "[a]ll picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall only take place along the public sidewalk *across the street* from the PLANNED PARENTHOOD building." This means, of course, that the demonstrators may not gather or picket on the public sidewalk directly in front of the clinic building. Appellants contend that this place restriction is invalid. We uphold the restriction as necessary to protect a woman's right to procreative choice on the basis of our state constitutional right to privacy. (Cal. Const., art. I, § 1.)

Unlike the clinic's private parking lot, the sidewalk in front of the clinic *is* a public forum where speech is entitled to heightened protection. (*Frisby v. Schultz* (1988) 487 U.S. 474, 479-480.) "The 'public forum' doctrine holds that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communication—such as in those places historically associated with first amendment activities, such as streets, *sidewalks*, and parks—especially because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels." (Tribe, American Constitutional Law (2d ed. 1988) § 12-24, p. 987, fns. omitted, emphasis supplied.)

"In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. . . . In these quintessential public forums, the government may not prohibit all communicative activity. . . . The State may[, however,] enforce regulations of the time, place, and manner of expression which are [1] *content neutral*, [2] *are narrowly tailored to serve a significant government interest, and* [3] *leave open ample alternative channels of communication.* [Citations.]" (*Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45, emphasis supplied; quoted in *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 244.)

The restriction requiring appellants to stay on the opposite side of the street from the clinic is clearly content neutral. It does not refer to the specific viewpoints that the demonstrators press, nor to the issues raised at the demonstration. Instead, it focuses exclusively on the location and manner of expression. (*Portland Fem. Women's H. Ctr. v. Advocates For Life* (9th Cir. 1988) 859 F.2d 681, 686.) The restriction thus passes this threshold test.

The clinic contends the restriction is also narrowly tailored to serve two significant government interests: (1) the state's interest in keeping public sidewalks and streets open and unimpeded; and (2) the interest in protecting a woman's constitutional right to privacy. We examine each contention separately.

We agree with the clinic that the place restriction is intended to (and does) serve the "significant government interest" of keeping the street and sidewalk free of obstacles which could block the free flow of vehicle and pedestrian traffic. (*Cameron v. Johnson* (1968) 390 U.S. 611, 612-613, fn. 1, 617 [Statute prohibiting pickets from interfering with free use of streets or sidewalks is "'a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection.' (Citation.)"]; *Thompson v. Police Dept.*

of New York (Sup. 1989) 546 N.Y.S.2d 945, 947; *Bering v. Share* (Wash. 1986) 721 P.2d 918, 926.)

Witnesses described the sidewalk in front of the building as "small"; this description is confirmed by photographs in the record.[3] The demonstrators' "standard procedure" is to have two to eight picketers walk up and down the sidewalk in front of the clinic while carrying large signs. This could easily block pedestrian traffic on the sidewalk. Moreover, witnesses testified that picketers would sometimes walk so slowly across the driveway leading to the clinic parking lot "that people [in their cars] have to sit in the street and wait to turn for a long time, or a lot of clients turn into the adjacent building to go through into the parking lot."

The more difficult question, however, is whether the provision completely prohibiting the protesters from conducting *any* activities on the sidewalk in front of the clinic is "narrowly tailored" to serve that significant government interest. The most analogous authority on this point comes from the Supreme Court of Washington. In *Bering v. Share*, *supra*, 721 P.2d 918, the Washington Supreme Court considered the validity of an injunction which banished anti-abortion protesters to a site around the corner from the entrance to a medical clinic. (*Id.*, 721 P.2d at pp. 921-923.) The court concluded that the place restriction was *not* narrowly tailored to serve the significant government interest in maintaining free ingress and egress to the medical clinic. The court noted that "[w]ith respect to the State's interest in maintaining ingress and egress, the injunction arguably could be narrowed without compromising that interest. The injunction could (1) limit the number of picketers, (2) require them to remain a certain distance from the walkway leading to the entrance, (3) require them to picket in single file, or (4) all of the above. By narrowing the injunction, the State could serve its significant interest in maintaining convenient

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[3] Although no measurements are provided in the record, based on the photographs it appears that the sidewalk is approximately four to six feet wide.

access to medical care without unduly limiting the picketers' expressive activities."[4] (*Id.*, at p. 930.)

Similarly, in the present case, it may be that the injunction could be narrowed without compromising the state's interest in maintaining the free flow of pedestrian and vehicle traffic. For example, the injunction could limit the number of picketers, limit the area of the sidewalk where the picketers could stand, and explicitly prohibit the picketers from blocking or delaying cars entering the clinic parking lot. These lesser measures might fully protect the state's interest in maintaining the free flow of traffic.

Nevertheless, the clinic contends the place restriction *is* "narrowly tailored" to serve another substantial government interest: namely, the state's interest in protecting a woman's constitutional right to privacy. The clinic again finds support for this argument in *Bering v. Share*, *supra*. As indicated, in that case the lower court restricted anti-abortion protesters to a public sidewalk around the corner from a medical clinic entrance. (721 P.2d at pp. 922–923.) After rejecting an argument that the restriction was narrowly tailored to serve the state's interest in maintaining easy access to the clinic (see discussion, *ante*, p. 545), the Washington Supreme Court held that the place restriction was narrowly tailored to further the state's interest in protecting a woman's constitutional right to privacy. The court reasoned: "An injunction which permitted any anti-abortion picketing on the [entrance] sidewalk would not adequately serve the State's *compelling* interest in protecting a woman's constitutional right of privacy from the coercive impact generated by the presence of the picketers in front of the Medical Building. In the absence of a place restriction, women visiting the clinic for abortion-related services would be forced to walk a gauntlet of

[4] Although the Washington Supreme Court concluded that the restriction was not "narrowly tailored" to serve the government interest in maintaining free ingress and egress, that court nevertheless upheld the place restriction on the ground it was necessary to protect a woman's constitutional right to privacy. (*Bering v. Share*, *supra*, 721 P.2d at p. 930.) We discuss this point in greater detail, *post*.

placard-carrying anti-abortionists. Even if all picketers agreed to refrain from using 'harassing language', it is difficult to ascertain what constitutes 'harassment' in the apprehensive mind of a woman coming face-to-face with the picketers. By restraining picketing to [the sidewalk around the corner], the court can avoid conjecture on this point, knowing that the woman's right of privacy is protected to the extent permissible under the First Amendment." (*Id.*, at p. 930, emphasis supplied.)

The *Bering* court based its reasoning on the federal constitutional analysis in *Roe v. Wade* (1973) 410 U.S. 113. Under *Roe* and its progeny, the courts upheld limitations on a woman's right to an abortion only if the limitations survived "strict" constitutional scrutiny—"that is, only if the governmental entity imposing the restriction [could] demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest." (*Planned Parenthood v. Casey* (1992) 120 L.Ed.2d 674, 711 (plur. opn.) and 749 (conc. and dis. opn. of Blackmun, J.).)

Recently, in *Planned Parenthood v. Casey*, *supra*, a plurality of the United States Supreme Court abandoned the strict scrutiny test in the abortion context. (120 L.Ed.2d 674.) In *Casey*, Justices O'Connor, Kennedy and Souter held that a regulation touching on abortion is *valid* unless it imposes an "undue burden" on a woman's ability to choose to have an abortion. (*Id.*, pp. 712–715.) The plurality explained that a regulation imposes an undue burden "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." (*Id.*, at p. 715.)

The Washington Supreme Court clearly relied on the *Roe* strict scrutiny standard in upholding the place restriction in *Bering v. Share*. The court stated that "for the purpose of defining a State's interest in a reasonable place restriction, this court recognizes the *constitutional protection* afforded the right to an abortion." (721 P.2d at p. 928, fn. 3, emphasis supplied.) At the time *Bering v. Share* was decided, the constitution shielded the right to abortion

from any regulation which was not "both necessary and narrowly tailored to serve a compelling governmental interest." (*Planned Parenthood v. Casey*, *supra*, 120 L.Ed.2d at pp. 749 (conc. and dis. opn. of Blackmun, J.), 711 (plur. opn.).) As interpreted by *Planned Parenthood v. Casey*, however, the federal Constitution now prohibits only those regulations which impose an "undue burden" on the right to choose an abortion. Obviously, the "undue burden" standard permits more regulation than does the "strict scrutiny" standard.

Turning to the case at bench, we believe the correct inquiry under the *federal* Constitution is whether allowing some form of protest on the sidewalk directly in front of the clinic would necessarily impose an "undue burden" on the patient's right to choose an abortion.[5] It is questionable whether the blanket injunction banning the protesters to the opposite side of the street could survive under this standard. However, we need not address this issue because our state Supreme Court has interpreted our state Constitution to require broader protection of a woman's right to choose an abortion than is afforded under the federal Constitution.

In *Committee to Defend Reproduction Rights v. Myers* (1981) 29 Cal.3d 252 (hereafter *Myers*), our Supreme Court concluded that the explicit right to privacy found in the California Constitution is broader than the implicit right to privacy in the federal Constitution. Consequently, the *Myers* court held that "the protection afforded the woman's right of procreative choice as an aspect of the right of privacy under the explicit provisions of our [state] Constitution is *at least* as broad as that described in *Roe v. Wade*." (*Id.*, at p. 281, emphasis supplied; see also *Robbins v. Superior*

[5] We agree with the Washington Supreme Court that, even though appellants are not state actors, we must look to "the constitutional protection afforded the right to an abortion" to determine whether a place restriction is valid. (*Bering v. Share*, *supra*, 721 P.2d at pp. 927-928, fn. 3.) That is, the "significant government interest" proffered to support a place restriction must be defined by the constitutional right the court seeks to protect. (*Perry Ed. Assn. v. Perry Local Educators' Assn.*, *supra*, 460 U.S. at p. 45.)

Court (1985) 38 Cal.3d 199, 213; *Conservatorship of Valerie N.* (1985) 40 Cal.3d 143, 163-164; Cal. Const., art. I, § 1.) Moreover, the California Constitution is a document "'of independent force'" and we are obliged "to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law." (*Myers*, *supra*, 29 Cal.3d at p. 261.) This means that, even after *Casey*, we are compelled by our *state* Constitution to strike down restrictions on a woman's right of procreative choice unless the restriction is narrowly tailored to serve a compelling governmental interest. (*Conservatorship of Valerie N.*, *supra*, 40 Cal.3d at pp. 163-164; *Vannier v. Superior Court* (1982) 32 Cal.3d 163, 178 (conc. and dis. opn. of Bird, C.J.); *Myers*, *supra*, 29 Cal.3d at pp. 279-281.)

In conclusion, under California law, the "compelling interest test" still applies even after *Casey*. Since the constitutional underpinning of *Bering* is still in place in California—and because we find that case persuasive—we choose to follow it.

Finally, the injunction also leaves open ample alternative means of communication. Even though the protesters are restricted to the opposite side of the street, they are still clearly visible to those entering or leaving the clinic. Thus, the protesters can communicate their message through placards or signs.

Because the restriction meets the three part test set out in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, *supra*, 460 U.S. at p. 45, we uphold the portion of the injunction restricting the protesters to the opposite side of the street.

C. Content Restriction

Finally,[6] appellants contend paragraph 4 of the injunction is in-

[6] Appellants also make a substantial evidence argument which we may dismiss in a footnote. They contend that the following provisions of the injunction are not supported by substantial evidence: (1) The paragraphs prohibiting them from recording license numbers or photographing persons entering the clinic and (2) the paragraph prohibiting them from touching staff or

valid because it impermissibly restricts the content of their speech. We agree.

The court found that the protesters "have called staff 'murderers' or asked them not to 'kill babies' in the presence of small children." Consequently, paragraph 4 of the permanent injunction enjoins appellants from making oral statements while at the picket site, in the presence of children under the age of 12, that refer to Planned Parenthood's "physicians, staff, or clients as 'murdering' or 'murderers,' 'killing' or 'killers;' or to children or babies being 'killed' or 'murdered' by anyone in the PLANNED PARENTHOOD building. . . ."

The clinic's argument in support of this restriction is again based on the Washington Supreme Court's opinion in *Bering v. Share*. There, the lower court issued an injunction with a content restriction nearly identical to that in the present case, except that it was not limited to statements made in the presence of children under 12. (721 P.2d at p. 924.) The Washington Supreme Court first noted that the restriction was not invalid under the prior restraint doctrine, and that, in any event, the United States Supreme Court had abandoned the prior restraint doctrine in several recent opinions. (*Id.*, at p. 932.) Instead, according to the Washington high court, the correct test for limitations on the content of speech is whether the content restriction is "'. . . narrowly drawn to ac-

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patients or making noise that can be heard inside the building. Appellants' argument is based on the mistaken premise that the court could only consider the evidence introduced at the hearing on the permanent injunction. As we have already indicated, we may assume the court considered the entire record before it. (See *ante*, fn. 1.) Read in its entirety, the record supports the trial court's findings and orders. (See *Chico Feminist Women's Health Center v. Scully*, *supra*, 208 Cal.App.3d at pp. 237–238, 248, 250 [upholding injunction prohibiting anti-abortion protesters from recording license numbers or photographing persons at the clinic]; *Planned Parenthood v. Wilson*, *supra*, 234 Cal.App.3d at pp. 1666, 1674 [affirming preliminary injunction which enjoined protesters from "producing noise which substantially interferes with PLANNED PARENTHOOD's ability to provide safe and proper health care services"].)

complish a compelling governmental interest.'" If it is, then the restriction is valid. (*Id.*, at p. 933, quoting *United States v. Grace* (1983) 461 U.S. 171, 177 and citing *Consolidated Edison Co. v. Public Serv. Comm'n* (1980) 447 U.S. 530, 540.)

Applying this test, the *Bering* court noted that the protesters had used the offending words in front of children who were accompanying patients of the clinic or had come to the medical building as patients themselves.[7] Moreover, there was expert testimony that the use of these words had "'inflicted trauma upon the children overhearing such references and . . . by their very utterance . . . harmed the doctor-patient relationship essential to the effective delivery of health care.'" (*Bering v. Share*, *supra*, 721 P.2d at p. 933, 934, 935.) Accordingly, the Washington Supreme Court concluded the state had a "compelling interest" in protecting children from the physical and psychological abuse inflicted by the picketers' speech. (*Id.*, at p. 935; see *FCC v. Pacifica Foundation* (1978) 438 U.S. 726.) Again, it is important to emphasize that the "children" to which the court refers are the children who came to the medical building as patients themselves or accompanied adult patients to the clinic.[8]

Although the *Bering* court concluded the content restriction did serve a compelling governmental interest, it nevertheless found the restriction too broad because it imposed a blanket restriction on

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[7] The medical building where the abortion clinic was located contained over two dozen offices which offered a wide range of services including pediatric, prenatal, and family oriented health care. (*Bering v. Share*, *supra*, 721 P.2d at p. 922.)

[8] Although the *Bering* court does not explicitly state this limitation, read as a whole, the opinion clearly indicates that the court is only concerned about children who are *coming to the clinic to receive services*, not about the children of the protesters. (*Bering v. Share*, *supra*, 721 P.2d at pp. 934–935 ["parents of children visiting the Medical Building are entitled to explain the concept of abortion to their children personally"; "this state has an interest in preventing the 'abuse' suffered by young children hearing the proscribed words just before they visit their doctors"; "children visiting the Medical Building cannot tune into a different station or tune out completely"].)

speech, whether or not children were present. Consequently, the court remanded the case to the trial court to narrow the content restriction so that it would apply only when children were present. (721 P.2d at pp. 935-936.)

We decline to follow *Bering* on this point. Putting aside the issue whether the content restriction is invalid as a "prior restraint,"[9] we conclude that *on this record* the clinic has not shown that the content restriction served a compelling governmental interest. The evidence introduced below shows that the *protesters* often brought their children to the clinic, and that the offending words were used in front of the *protesters'* children. The only evidence that clinic *patients* brought their children to the clinic is found in a declaration by the clinic's counsel. She stated that on one occasion, the protesters "handed a plastic fetus to a two year old who was accompanying his mother into the clinic for family planning." There is no evidence that the offending words were ever used in the presence of the clinic patients and *their* children.

Moreover, unlike the medical building in *Bering*—which offered pediatric, prenatal, and family health care—the building in this case contained only one medical office: the Planned Parenthood Clinic, which respondents themselves describe as offering "a full range of reproductive health services for *men* and *women*. . . ." Thus, it appears that the clinic did not offer medical services to children. Consequently, on this record, we are not faced with the situation

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[9] The dissent in *Bering* concluded that the content restriction *did* constitute a prior restraint, and that the restraint could only be upheld if "the communication restrained is constitutionally unprotected speech such as obscenity, incitement to acts of violence, or speech that directly threatens military security." (*Bering v. Share*, *supra*, 721 P.2d at p. 942 (dis. opn. of Dore, J.).) We decline to enter the prior restraint thicket. Instead we first consider whether the speech itself is constitutionally protected, because " '[w]here the speech in question is in all events guaranteed by the First Amendment, attributing that guarantee to the circumstance of prior restraint is at best irrelevant and often misleading.' " (Tribe, American Constitutional Law (2d ed. 1988) § 12-34, p. 1041, quoting Jeffries, *Rethinking Prior Restraint*, (1982) 92 Yale L.J. 409, 437.)

in *Bering* where the offending words, " '. . . by their very utterance . . . harmed the doctor-patient relationship essential to the effective delivery of health care [to children].' " (*Bering v. Share*, *supra*, 721 P.2d at p. 933.) In addition, unlike *Bering*, there was no expert testimony in this case which tended to show that the offending words "inflicted trauma" upon the children who heard them. (*Id.*, at pp. 933, 935-936.)

Finally, one of the primary justifications cited by the *Bering* court to support its conclusion that protection of children is a "compelling governmental interest" cuts the other way in this case. The *Bering* court noted that " 'the parents' claim to authority . . . to direct the rearing of their children is basic in the structure of our society. . . .' " (*Bering v. Share*, *supra*, 721 P.2d at p. 934, quoting *Ginsberg v. New York* (1968) 390 U.S. 629, 639.) Based on this principle, the *Bering* court concluded that "parents of children visiting the Medical Building are entitled to explain the concept of abortion to their children personally, and only when they believe the children are able to understand it." (*Bering v. Share*, *supra*, at p. 934.) Here, by contrast, the injunction *prevents* the protesters from expressing their *own* views to their *own* children (albeit in limited circumstances).

We are not concerned here with limitations on "indecent" or quasi-obscene speech. (Compare *Ginsberg v. New York*, *supra*, 390 U.S. at pp. 634, 636, 643; *FCC v. Pacifica Foundation*, *supra*, 438 U.S. at pp. 741, 755 (conc. opn. of Powell, J.), both of which the court relied on in *Bering v. Share*, *supra*.) Instead, we are confronted with an attempt to limit *political speech* in its most raw and powerful form. The Supreme Court has stated that "a *content-based* restriction on *political speech* in a *public forum* . . . must be subjected to the most exacting scrutiny." (*Boos v. Barry* (1988) 108 S.Ct. 1157, 1164, emphasis in original.) This is because the right to political expression lies at the "core" of the First Amendment. (*Meyer v. Grant* (1988) 486 U.S. 414, 420; *Buckley v. Valeo* (1975) 424 U.S. 1, 44-46.)

There is no question that the limitation here restricts "core political speech." (*Meyer v. Grant*, *supra*, 486 U.S. at p. 420.) Indeed, abortion may be *the* political issue of the last 20 years. Further, "[t]he words 'murder', 'kill', and their derivatives play an essential role in the debate concerning abortion. To those opposed to abortion, the logical conclusion of that moral position is that abortions result in babies being killed or murdered. If the court were to deprive picketers of the words which most clearly [and powerfully] embody the moral position of those picketers, it would eviscerate completely the debate concerning abortion. Just as abortion proponents must be able to articulate their belief that abortion is constitutionally justified as an aspect of a woman's right to procreative freedom, [citation], so must abortion opponents be permitted to articulate their belief that abortion should not be permitted because it involves the taking of human life." (*Bering v. Share*, *supra*, 721 P.2d at p. 943 (dis. opn. of Dore, J.).)

D. Disposition

To summarize, we strike paragraph 4 of the permanent injunction as an unconstitutional restriction on the content of appellants' speech. In all other respects, the judgment is affirmed.

Respondents and appellants shall each bear their own costs on appeal.

WHITE, P.J.

We concur:

MERRILL, J.

WERDEGAR, J.

APPENDIX D

[Filed Mar. 3, 1993]

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION: 3

A055117
Solano County No. 110090

PLANNED PARENTHOOD SHASTA-DIABLO, INC.

vs.

WILLIAMS, CHRISTINE, *et al.*

BY THE COURT:

The petition for rehearing is denied.

Dated: Mar. 3, 1993

WHITE, P.J.

APPENDIX E

[Filed Aug. 8, 1990]

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF SOLANO

Case No. 110090

PLANNED PARENTHOOD SHASTA-DIABLO INC.,
a California Not For Profit Corporation,

Plaintiff,

vs.

CHRISTINE WILLIAMS, individually, CITIZENS FOR LIFE, BIRTHRIGHT OF VALLEJO, an unknown entity, and THAT CLASS OF PERSONS ACTING IN CONCERT WITH NAMED DEFENDANTS, DOES 1-300, inclusive,

Defendants.

ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING ORDER THEREON.
[CCP Sections 526 and 527]

Upon reading the Verified Complaint of Plaintiff herein and upon reading the Declaration of counsel, the Points and Authorities submitted herewith, and it appearing to the satisfaction of the Court that this is a proper case for granting and Order to Show Cause and a Temporary Restraining Order, and that unless the Temporary Restraining Order pleaded for in the Complaint be

granted, great or irreparable injury will result before the matter can be heard on notice:

IT IS HEREBY ORDERED that the above-named Defendants, Christine Williams, individually, Citizens for Life, Birthright of Vallejo, an unknown entity, and That Class of Persons Acting In Concert With Named Defendants, Does 1 through 300, appear in Department 3 of this Court located at 321 Tuolumne, Vallejo, California on August 24th, 1990 at 8:30 A.M., or as soon there after as this matter may be heard, then and there to show cause, if any there is, why they and their agents, servants, employees, and representatives should not be enjoined and restrained during the pendency of this action, from engaging in, committing, or performing, directly or indirectly, any and all of the following acts:

1. From blocking any entrance or exit into 990 Broadway, Vallejo, California;

2. From verbal harassment or threatened physical contact to any person coming in and out of 990 Broadway, Vallejo, California;

3. From shouting any words or making noises likely to disturb the peace of the clients and the staff of the Clinic;

4. From any acts which would cause emotional distress to clients and workers at the Clinic;

5. From bringing children to the property;

6. From taking down license numbers of cars on the property;

7. From photographing any persons coming to and going from the complex known as 990 Broadway, Vallejo, California;

8. To restrict the Defendants' picketing to the public sidewalk in front 990 Broadway, Vallejo, California;

9. To restrict pickets to two (2).

IT IS HEREBY ORDERED that copies of this Complaint, Declarations, Memorandum of Points & Authorities, this Order to Show Cause, supporting exhibits, and Temporary Restraining Order be served upon Defendants no later than August 20, 1990.

Dated: August 8, 1990

ORDER

Each of the Defendants is hereby restrained from each and all of the above-referenced acts numbered 1-9 in the Order To Show Cause and incorporated herein until the hearing on this matter.

Aug. 8, 1990

/s/ Dennis Bunting
Judge of the Superior Court

APPENDIX F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SOLANO

Case No. 110090

MINUTES - CIVIL

Planned Parenthood
vs/and Shasta-Diablo Inc. et al
Christine Williams, et al

Date: 9-19-90
Judge: Dennis Bunting
Reporter: Jim Clayton
Clerk: Patricia Bence

APPEARANCES:

[X] Plaintiff/Petitioner [ ]with [X]thru counsel Karen Ripley [ ]in pro p.
[X] Defendant/Respondent [ ]with [X]thru counsel John Sibert [ ]in pro p.
[ ]Other:

ON CALENDAR FOR:

[ ] Uncontested/default/stipulated [ ]Contested PETITION for:
[ ]Dissolution of Marriage [ ]Legal Separation [ ]Nullity [ ]Adoption [ ]Comp Minor's C.
[ ] Default Judgment re COMPLAINT for:
[X] Plaintiff/Petitioner's [ ]Defendant/Respondent's
[X]ORDER TO SHOW CAUSE [ ]MOTION [ ]DEMURRER [ ]FOR MODIFICATION [ ]CONTEMPT
[ ]Child Custody [ ]Visitation [ ]Child Support [ ]Spousal Support [ ]Attorney Fees & C.
[ ]Injunctive Order [X]Other (Specify) Preliminary Injunction
[ ] Other:

PROCEEDINGS:

[X]Case called [ ]No appearances [ ]Off calendar [ ]by the Court [ ]by stipulation of counse.
[ ]No proof of service received.
[ ]Petitioner [ ]Respondent [ ]Other _____ sworn & testifie
[ ]MOTION [ ]granted [ ]denied [ ]with [ ]without prejudice.
[ ]DEMURRER [ ]sustained [ ]overruled [ ]with ___ days [ ]without leave to [ ]amend [ ]answer
[ ]MODIFICATION [ ]granted [ ]denied. [ ]ORDER TO SHOW CAUSE is discharged.
[ ]Petitioner [ ]Respondent [ ]found [ ]not found, in contempt [ ]admits contempt.
[ ]The parties waive their rights to notice of trial, statement of decision, motion for new trial, and right to appeal.
[ ]PETITION [ ]JUDGMENT [ ]granted [ ]as prayed [ ]denied [ ]effective _____
[ ]STIPULATION [ ]Marital Settlement [ ]Distribution of Property Agreement [ ]approved [ ]incorpc
[ ]The Court finds defendant to be the father of minor(s): _____
[ ]CUSTODY of minor children: [ ]sole [ ]joint legal with physical awarded to [ ]Pet. [ ]Resp.
[ ]reasonable visitation to other party with reasonable/_____ notice [ ]visitation be:
[ ]Agreement of the parties re custody and visitation per Court Mediator's report dated _____, is approved and the parties are directed to comply.
[ ]SUPPORT: [ ]Petitioner [ ]Respondent/Defendant to pay each month
[ ]CHILD $_____ per child [ ]SPOUSAL [ ]waived [ ]reserved $_____
[ ]FAMILY $_____ [ ]ARREARAGES $_____ for [ ]Child [ ]Spousal support
[ ]Payments shall be made on _____ and _____ commencing _____
[ ]through District Attorney's Family Support Division [ ]by wage assignment.
[ ]Support based upon gross/net income: Petitioner _____ Respondent _____
[ ]Petitioner [ ]Respondent to maintain medical and dental insurance for the children, if available through employment [ ]and equally share any uninsured expenses.
[ ]Pension Benefit Plan [ ]Military Retirement reserved.
[ ]Former name of wife may be restored upon entry of final judgment: _____.
[ ]ATTORNEY FEES [ ]COSTS [ ]reserved [ ]each party bear own [ ]Petitioner [ ]Respondent to pay $_____ [ ]at rate of $_____ per month commencing _____
[ ]Petitioner [ ]Respondent ordered to pay filing fees and costs.
[ ]Matter taken under submission [ ]after oral arguments [ ]on merits.
[ ]Briefs due [ ]10-10-5 [ ]other: _____. Atty _____to oper.
[ ]Matter referred to Mediation.
[ ]TRO [ ]granted [ ]continued as to [ ]property [ ]conduct against [ ]Petitioner [ ]Respondent.
[ ]Restraining orders to remain in effect.
[X]Atty Ripley prepare order & submit to Atty Stuart for approval.
The Court finds the declarations lodged by Ms Stuart are appropriate. The plaintiff calls the witness Janice Schoenfeld, sworn and testified after which plaintiff rests as offer of proof. Defense Counsel, Defense Counsel states his objections, the (over)
[ ]CONTINUED: [ ]by the court [ ]by stipulation [ ]at request of _____
TO: _____

MINUTES - CIVIL

BEST AVAILABLE COPY

Court sustaines the objection. The plaintiff
now rests. Defens Counsel calls as witness
Jeanette Hammer, sworn and testified
after which defens rest. The Court asks
Ms. Hammer to return to the stand so
that the Court can ask her some additional
questions. On rebuttal plaintiffs Counsel call
herself. Karen Pyer, sworn and testified.
Closing arguments were presented to the
Court by Counsel. The Court finds there is
no evidence to support the preliminary
injunction as to Burbright and Christ
Price. The Court approves the preliminary
injunction as to Christen Williams of
Solano Citizens for life, any officers, agents,
representatives or employees 990 Broadway,
Vallejo Ca. Verbal Harassment any persons
Comming in or out of the Clinic, Shouting
any Words to Clients and staff of plaintiffs
no Children under the age of 12 years old
on the property. From photographing any person
comming to or going from the Clinic at
990 Broadway Vallejo Ca. From assisting, address
any Client or Child who has refused plastic
fetus. Recording licens plates of Clients, etc.
Restrict picketing and/or Counseling to the public
sidewalk in front of the building. Defendants
Can Maintain four (4) pickets and not more
than two (2) shall be less than ten feet from
any other picketer or Counselor.

APPENDIX G

SUPREME COURT OF CALIFORNIA

S031721

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,
Plaintiff and Respondent,

v.

CHRISTINE WILLIAMS, *et al.*,
Defendants and Appellants.

[Filed May 26, 1994]

(Ct.App. 1/3 No.
A055117
Solano County Super.
Ct. No. 110090)

We are confronted in this matter with a collision between competing constitutional interests involving a subject of exceptional public concern. The precise question is whether, in granting and upholding a permanent injunction against anti-abortion protesters, the trial court and Court of Appeal properly balanced the free speech and assembly rights of the protesters, against the health and safety interests of women attempting to obtain medical services, including clinical abortions, in a private medical facility. We conclude that the injunction, as modified by the Court of Appeal, is constitutional and therefore shall affirm the judgment.

SEE CONCURRING AND DISSENTING OPINIONS

I. FACTS

Viewed independently to determine whether the evidence supports the judgment (*Bose Co. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 498–511), the record discloses the following:[1]

Planned Parenthood is a nonprofit corporation operating a family planning clinic in Vallejo. The clinic provides a range of family planning, health and counseling services, including abortions. Located in a one-story building that it shares with another commercial tenant, a tax service, the clinic adjoins a parking lot located on one side and to the rear of the building. There is a concrete yard for additional parking immediately in the front, and a narrow public sidewalk between the yard and the street. The sidewalk is punctuated by two driveway entrances.

Solano Citizens For Life, under the direction of Christine Williams (hereafter petitioners), is an organization opposed to abortion. Beginning in March 1990, petitioners and others began gathering at the clinic, primarily on Thursdays when abortions were performed, to demonstrate against abortion. Although their numbers varied, there were usually six to eight demonstrators at any given time, and occasionally as many as one hundred. The protesters frequently brought their children as well, ranging in age from infants to teens.

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[1] *Bose* held that in cases involving the constitutional rule of *New York Times* (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254) facts pertinent to the critical question of actual malice must be independently reviewed. (*Bose*, *supra*, 466 U.S. at pp. 505–514; see also *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 842.) It is unclear whether appellate courts have a duty to review de novo all facts relevant to the application of First Amendment principles in all cases involving time, place and manner restrictions. (See *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 53, fn. 3; *Don's Porta Signs, Inc. et al. v. City of Clearwater, Florida* (11th Cir.1987) 829 F.2d 1051 (cert. denied (1988) 485 U.S. 981 (White, J., dis.)).) We need not resolve this question, however, since we determine that, under any standard, the trial court's findings should not be disturbed.

Petitioners picketed on the sidewalk in front of the clinic as well as in the parking lot, carrying signs condemning abortion. One of the tactics of the sidewalk picketers was to walk slowly across the driveway entrance, thereby delaying cars attempting to turn into the lot. As the cars drove in, the protesters would approach and surround the car, attempting to pass literature through the windows even as they were being rolled up. Others pursued patients walking from their cars to the clinic entrance, as well as along the sidewalk and across the street to the bus stop, offering "sidewalk counseling." "Counseling" consisted of pressing anti-abortion literature and plastic replicas of fetuses on patients attempting to enter the clinic and exhorting them to reconsider their decision to have an abortion. Petitioners also stationed several "counselors" directly outside of the clinic entrance for the same purpose.

The anti-abortion protesters also targeted clinic staff, on at least one occasion calling a clinic nurse a "murderess" and admonishing her not to "kill" babies. They also photographed clinic staff and patients and recorded the license numbers of cars entering the lot.

Petitioners' activities created emotional distress and anxiety in the clinic's patients. As a result the clinic began to utilize volunteer escorts to accompany patients entering and leaving the building. In one instance the escorts dispersed a group of protesters encircling an emotionally distraught patient on the sidewalk.

II. PROCEDURAL HISTORY

In August 1990, Planned Parenthood filed the instant action for a temporary restraining order and preliminary and permanent injunction. The trial court issued a temporary restraining order that enjoined petitioners from harassing any person entering or leaving the clinic and restricted their picketing to the sidewalk in front of the building. After a subsequent hearing, the trial court granted a preliminary injunction restricting to four the number of pickets that petitioners could maintain on the sidewalk in front of

the clinic, and requiring that at least two of the pickets remain a minimum of ten feet from the other two.

Trial on the complaint for a permanent injunction was held in April 1991. Witnesses for both the clinic and petitioners described the protest activities at the clinic and their impact on patients and staff. There was also testimony that police enforcement of the terms of the preliminary injunction had been necessary.[2]

Following trial, the court made findings that petitioners had: (1) confronted and intimidated women seeking the clinic's services and forced plastic replicas of fetuses and "counseling" upon the clinic's staff and clients; (2) interfered with or obstructed entrance to and exit from the clinic; (3) pursued patients to their cars or public transportation to distribute literature and plastic fetuses; and (4) caused some of the women seeking counseling or services to become emotionally distraught.[3]

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[2] The dissent's suggestion that there were no problems with enforcing the preliminary injunction is incorrect. One witness, Janice Schoenfeld, testified at the hearing on the permanent injunction that the demonstrators "followed the injunction usually, *except for picketers*." The picketers are precisely the sidewalk protesters at issue here, and they are clearly the ones who were apparently *not* obeying the preliminary injunction. Furthermore, Marsha Anderson, the clinic director, also testified that she had been compelled to "call[] the police to issue the injunction a couple of times, to hand it out to people who were on the sidewalk and were about to break the rules." The dissent suggests that Ms. Anderson was referring to the temporary restraining order. On the contrary, the context of her statement, and her reference to issuance of the "injunction," makes it reasonably clear that she is referring to the preliminary injunction. The distinction is practically irrelevant in any event. The preliminary injunction issued a mere one month after the temporary restraining order. It seems unlikely that the witness was referring exclusively to events occurring during that one month interval. Rather, she is clearly referring to events subsequent to the issuance of the temporary restraining order and preliminary injunction, but prior to the hearing on the permanent injunction.

[3] The court also found that petitioners had recorded the license plate numbers of clinic staff and patients and photographed them; that petitioners had called staff "murderers" and asked them not to "kill babies"; that the clinic had to escort its patients through picket lines and "picket/counselors" in the parking lot; and that petitioners had conducted these activities on a weekly basis with as many as 100 people involved.

Based on these findings, the trial court granted a permanent injunction against petitioners, enjoining them from: (1) blocking any entrance or exit to the clinic building; (2) recording the license numbers of cars entering or leaving the clinic; (3) photographing any person entering or leaving the clinic building; (4) referring, in oral statements while at the clinic site, to physicians, staff or clients as "murdering" or "murderers," "killing" or "killers," or children or babies being "killed" or "murdered" by anyone in the clinic building in the presence of children under 12; and (5) shouting at or touching physicians, staff or patients entering or leaving the clinic or making noise that could be heard inside the premises. In addition, the injunction restricted all picketing, demonstrating or counseling to the public sidewalk across the street from the clinic building.

On appeal, petitioners challenged those provisions of the injunction that: (1) restricted the content of their speech by preventing them from using specific language in front of children while at the protest site; (2) excluded them from the clinic parking lot; and (3) excluded them from the public sidewalk in front of the clinic building. The Court of Appeal invalidated the content restriction on petitioners' speech, finding that it was not justified by any compelling interest apparent from the record. The Court of Appeal upheld the parking lot exclusion, however, ruling that the clinic was not the functional equivalent of a public forum under *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, and that petitioners were not, therefore, entitled to exercise their free speech rights on clinic property. The court also sustained the sidewalk restriction, concluding that it served a substantial governmental interest in safeguarding a woman's right to procreative

choice under article I, section 1, of the California Constitution, and was narrowly tailored to serve that interest.[4]

Petitioners sought review solely on the issue of the sidewalk exclusion. We granted the petition to consider that aspect of the injunction.

III. DISCUSSION

We recognize at the outset the intense moral, religious and political concerns associated with the underlying subject matter of this lawsuit. We are constrained, however, to focus on the legal issue presented. The sole legal question, as noted, is whether the injunction provision that effectively bars petitioners from the public sidewalk in front of the clinic by requiring that all picketing, demonstrating or counseling take place on the public sidewalk directly across the street, violates petitioners' First Amendment rights. To answer this question we apply a familiar framework of analysis.

A. Regulation of Speech in a Public Forum

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ." (U.S. Const., 1st Amend.) These rights are safeguarded against state interference by the due process clause of the Fourteenth Amendment. (*De Jonge v. Oregon* (1937) 299 U.S. 353, 364.) Furthermore, it is settled that when, as here, the judicial process is invoked to restrict expressive activities on public property, "state action" is implicated entitling the aggrieved party to the protection of the First and Fourteenth Amendments. (*A.F. of L. v. Swing* (1941) 312 U.S. 321; *Bakery*

[4] The Court of Appeal also held that the sidewalk restriction served a substantial governmental interest in keeping the public street and sidewalk unimpeded for the free flow of vehicle and pedestrian traffic (*Cameron v. Johnson* (1968) 390 U.S. 611, 622), but concluded that the restriction was not narrowly tailored to further that end.

Drivers Local v. Wohl (1942) 315 U.S. 769; *Hudgens v. NLRB* (1976) 424 U.S. 507, 519–521; *Feminist Women's Health Center v. Blythe* (1993) 17 Cal.App.4th 1543, 1561; *Bering v. Share* (Wn. 1986) 721 P.2d 918, 925; see also *Shelley v. Kraemer* (1948) 334 U.S. 1, 17.)

It is equally undisputed that peaceful picketing and leafletting constitute expressive "speech" activities at the core of the First Amendment. (*United States v. Grace* (1983) 461 U.S. 171, 176–177; *Frisby v. Schultz* (1988) 487 U.S. 474, 479.) When these activities occur in "public forums" historically associated with free expression, such as public streets and sidewalks, the right of the state to limit the expressive conduct is sharply circumscribed. (*Perry Ed. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 44–45; *Hague v. CIO* (1939) 307 U.S. 496, 515.)

Nevertheless, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." (*Heffron v. Int'l Soc'y for Krishna Consc.* (1981) 452 U.S. 640, 647.) "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791, quoting *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293.)

Here it is undisputed that the public sidewalk directly in front of the clinic from which petitioners are barred constitutes a public forum. Thus, we must determine whether the place restriction is content neutral, narrowly tailored to serve a significant governmental interest, and permits ample alternative channels of communication. (*Frisby v. Schultz*, *supra*, 487 U.S. at pp. 480–481; *Perry Ed. Assn. v. Perry Local Educators' Assn.*, *supra*, 460 U.S. at p. 45, 103 S.Ct. at p. 954.)

B. Content Neutral

The United States Supreme Court has defined content neutral speech regulations as those that regulate "without reference to the content of the regulated speech." (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 771.) The injunction at issue here makes no reference whatsoever to the content of petitioners' speech; it merely provides that all picketing, demonstrating or counseling shall take place on the public sidewalk across the street from the clinic. No speech of any "particular content" is "singled out" for better or worse treatment by the government. (*Ibid.*) Thus, the place restriction is clearly content neutral.

Petitioners strenuously assert otherwise, noting that the injunction was impelled by their anti-abortion protests and applies only to such activities. Obviously the injunction at issue here is confined to petitioners, and properly so; they were the only ones found to have harassed clinic patients and staff. (See *Northeast Women's Center, Inc. v. McMonagle* (3d Cir. 1991) 939 F.2d 57, 63 [restriction on anti-abortion protest activities within 500 feet of a women's health clinic properly "applies only to [defendants], but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation"]; *Pro-Choice Network v. Project Rescue* (W.D.N.Y. 1992) 799 F.Supp. 1417, 1433 ["It is true that the injunction applies only to the defendants, but that is because it is only the defendants who have created a threat of harassment and intimidation."].) A restriction that enjoined all picketers in addition to petitioners would clearly have been overbroad. (See *Thornhill v. Alabama* (1940) 310 U.S. 88, 97–98; *Bering v. Share*, *supra*, 721 P.2d at pp. 925–926.)

Furthermore, as the United States Supreme Court has explained: "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on *some* speakers or messages but not *others*." (*Ward v. Rock Against Racism*, *supra*, 491 U.S. at p. 791, italics added.) Thus, the vast

majority of courts that have considered the issue have upheld time, place and manner restrictions on anti-abortion protesters against challenges that they improperly "single out" such demonstrators or their message. (See, e.g., *Feminist Women's Health Center v. Blythe*, *supra*, 17 Cal.App.4th at p. 1559, ["the locational restriction on defendants' activity was not based on the content of their speech but on the conduct involved, i.e., the obstruction of ingress and egress by physical blocking and harassment, and on the risk of harm to the clinic's patients"]; *Bering v. Share*, *supra*, 721 P.2d at p. 925 [injunctive restrictions on anti-abortion protesters "are not related to the content of [the] picketers' speech, but rather to the way in which they conducted themselves at the picket site"]; *Fargo Women's Health v. Lambs of Christ* (N.D. 1992) 488 N.W.2d 401, 408 ["When an injunction is based on a record of force, trespass and intimidation, the justification for the injunction is the method of communicating, not the motivating idea."]; *Northeast Women's Center, Inc. v. McMonagle*, *supra*, 939 F.2d at p. 63 ["The injunction at issue here is content-neutral. . . . The challenged sections of the injunction make no mention whatsoever of abortion or any other substantive issue—they merely restrict the volume, location, timing, and violent or intimidating nature of [defendants'] expressive activity."]; *N.Y. State Nat. Organization For Women v. Terry* (2d Cir. 1989) 886 F.2d 1339, 1363 ["The message—that abortion is wrong, immoral, and must be stopped—is not singled out for unfavorable treatment. The injunction is not a ban, nor is it a ban masquerading as a limitation."]; *Portland Fem. Women's H. Ctr. v. Advocates for Life* (9th Cir. 1988) 859 F.2d 681, 686 [Limitation on anti-abortion protests "is not a content-based restriction of expression. . . . Rather, it focuses exclusively on the location and manner of expression."]; *Pro-Choice Network v. Project Rescue*, *supra*, 799 F.Supp. at p. 1433 [Injunction limiting pro-life protest activities "is content-neutral. . . . It regulates when, where and how defendants may speak, but not what they may say."]; but cf. *Cheffer v. McGregor* (11th Cir. 1993) 6 F.3d 705, 710–711; *Thomason v. Jernigan* (E.D. Mich. 1991) 770 F.Supp. 1195, 1201.)

As noted earlier, the place restriction at issue here makes no reference to petitioners' particular viewpoint or even to the general subject matter of their demonstrations; it focuses exclusively on the *manner* and *location* of their expressive activities, effectively insulating the clinic's patients and staff from close physical contact with petitioners—*not* from the content of their speech. (See *Portland Fem. Women's H. Center v. Advocates for Life*, *supra*, 859 F.2d at p. 686.) Indeed, a similar injunction might just as readily apply to pro-choice demonstrations or to any other disruptive protest in close physical proximity to the clinic. Thus, we conclude that the injunction satisfies the threshold test of content neutrality.

For similar reasons, petitioners' claim that the injunction operates as an unconstitutional "prior restraint" on protected speech must fail. A prior restraint is a content-based restriction on speech prior to its occurrence. (*Southeastern Promotions, Ltd. v. Conrad* (1975) 420 U.S. 546, 558–559; *Northeast Women's Center, Inc. v. McMonagle*, *supra*, 939 F.2d at p. 63; Tribe, American Constitutional Law (2d ed. 1988) § 12–34, p. 1040.)[5] Valid time, place and manner restrictions which do not functionally prohibit all means of communication are not prior restraints. (See, e.g., *Poulos v. New Hampshire* (1953) 345 U.S. 395, 408; *Cox v. New Hampshire* (1941) 312 U.S. 569, 574–576; cf. *Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 418–419.)

B. Significant State Interest

The more difficult question is whether the interests served by the injunction are consonant with its scope. Is the place restriction narrowly tailored to advance significant governmental interests, and does it allow adequate alternative avenues of communication? On balance, we conclude that the place restriction serves a significant

[5] The prior restraint doctrine has also been invoked to invalidate procedurally inadequate or overbroad permit requirements. (See, e.g., *National Socialist Party v. Skokie* (1977) 432 U.S. 43; *Staub v. City of Baxley* (1958) 355 U.S. 313.)

governmental interest in safeguarding the health and safety of the clinic's patients, and is narrowly tailored to further that interest. We also conclude that the restriction allows petitioners adequate alternative means of conveying their anti-abortion message.

The Supreme Court has recognized that the reasonableness of a time, place or manner restriction depends heavily upon "[t]he nature of a place, 'the pattern of its normal activities. . . .' The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 116.) The high court has applied this principle to uphold regulation of speech activities on public streets and sidewalks in front of schools (*ibid.*), courthouses (*Cox v. Louisiana* (1965) 379 U.S. 559) and private residences (*Frisby v. Schultz*, *supra*, 487 U.S. 474). In *Grayned*, the court upheld a limitation on noisy demonstrations near schools during classroom hours, observing that the city had a "compelling interest in having an undisrupted school session conducive to the students' learning. . . ." (408 U.S. at p. 119.) In *Cox*, the court sustained a restriction on picketing outside of courthouses, holding that the statute served a significant state interest in protecting "the fair and orderly working of the judicial process." (379 U.S. at p. 565.) And in *Frisby*, the high court upheld a ban on picketing in front of individual residences, ruling that the ordinance furthered a substantial state interest in assuring "residential privacy" and response. (487 U.S. at p. 484.)[6]

[6] As *Frisby* also illustrates, the state's interest in safeguarding individual privacy is particularly strong in circumstances where the audience cannot readily avoid the message. Thus, the government may properly protect "captive" listeners from unwanted intrusions into the home (*Frisby v. Schultz*, *supra*, 487 U.S. 474), on city buses (*Lehman v. City of Shaker Heights* (1974) 418 U.S. 298), and wherever individuals cannot escape "bombardment of [their] sensibilities." (*Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205, 211, quoting *Cohen v. California* (1971) 403 U.S. 15, 21.) As we discuss below (*post*, 30 Cal.Rptr.2d at 640–641, [App. 89a–90a]), the Constitution does not guarantee petitioners the right to create, in effect, a captive audience by cordoning off an area of the sidewalk and allowing no one to pass who did not agree to listen to their message.

The principle that sustains the regulation of disruptive expression outside of schools, courthouses and individual residences applies equally, in our view, to permit the regulation of conduct "incompatible" with the health and safety of patients in a medical facility. (*Grayned v. City of Rockford*, *supra*, 408 U.S. at p. 116.) Indeed, the United States Supreme Court has explicitly recognized that the government has a significant interest in protecting hospital patients from disturbance. (See *Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483 [upholding restrictions on speech designed to shield patients from upsetting speech]; *NLRB v. Baptist Hospital, Inc.* (1979) 442 U.S. 773 [semble]; see also Note, *Too Close For Comfort: Protesting Outside Medical Facilities* (1988) 101 Harv.L.Rev. 1856, 1862–1866 [hereafter, Note].)[7]

This interest is particularly acute in the context of family planning clinics that perform the most intimate of medical services, including abortions. The constitutional right of privacy that guarantees a woman's freedom to choose an abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. ___ [112 S.Ct. 2791]; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252) defines an equally substantial governmental interest in assuring that they are performed in a safe and suitable environment.[8] As the high court has stated, the government "may properly assert *important interests in safeguarding health*" and "in maintaining medical standards" in the performance of abortions. (*Roe v. Wade* (1973) 410 U.S. 113, 154, italics added.) The state has a "legitimate interest in seeing to it that an abortion, like any other medical procedure, is performed under circumstances that *insure maximum safety for the patient*." (*Id.* at p. 150, italics added.)

[7] As stated in *Beth Israel Hosp. v. NLRB*, *supra*, 437 U.S. 483, "Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients. . . . are principal facets of the day's activity, and where the patient and his family need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sickbed." (*Id.* at p. 509 (conc. opn. of Blackmun, J.) and quoted in *NLRB v. Baptist Hospital, Inc.*, *supra*, 442 U.S. at pp. 783–784, fn. 12.)

[8] We have recently held, moreover, that the privacy rights set forth in article I, section 1 of the California Constitution are protectible not only against governmental intrusion, but against private invasions as well. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1.)

The state's responsibility for the health and safety of women seeking medical services, including abortions, extends beyond the operating room. Physical or emotional intimidation of patients outside the doctor's office may significantly affect their course of treatment once they are inside. As one commentator has observed, "Forced [physical] proximity combined with unwanted speech threatens not only patients' repose and autonomy but their health as well." (Note, *supra*, 101 Harv.L.Rev. at pp. 1864–1865, fns. omitted.)

Indeed, emotionally jarring confrontations with anti-abortion pickets or sidewalk "counselors" may pose serious health risks. As one federal district court found: "Women entering and leaving clinics have been verbally harassed; the effect of such harassment has been to increase the level of anxiety a woman feels and to exacerbate any emotional problems associated with the abortion decision and procedure which in turn may have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter." (*American C. of Ob. & Gyn., Pa. S. v. Thornburgh* (E.D.Pa. 1985) 613 F.Supp. 656, 666, affd. on other grounds *sub nom. Thornburgh v. American Coll. of Obst. & Gyn.* (1986) 476 U.S. 747.) Another court found that women confronted and harassed by anti-abortion demonstrators before entering the clinic suffered "[i]ncreased stress and anxiety" which could "cause patients to . . . have elevated blood pressure . . . hyperventilate . . . require sedation . . . or require special counseling and attention before they are able to obtain health care." (*Pro-Choice Network v. Project Rescue*, *supra*, 799 F.Supp. at p. 1427.) Others have noted that patients required to reschedule appointments as

a result of stress-induced emotional trauma could face additional risks and complications arising from the delay, e.g., the added risks of a second- rather than a first-trimester abortion. (*Ibid.*; see also *Feminist Women's Health Center v. Blythe*, *supra*, 17 Cal.App.4th at pp. 1553, 1555; *Planned Parenthood v. Holy Angels Catholic Church* (N.D.Cal. 1991) 765 F.Supp. 617, 620.) Medical staff at family planning clinics have testified before Congress that the psychological stress resulting from aggressive anti-abortion demonstrations has complicated both the medical treatment itself and the patient's subsequent well-being. (Abortion Clinic Violence: Oversight Hearings Before the Subcom on Civil and Constitutional Rights of the House Com on the Judiciary, 99th Cong., 1st & 2d Sess., cited in *Note*, *supra*, 101 Harv.L.Rev. at pp. 1865–1866.)

In light of this evidence, a considerable number of courts have upheld time, place and manner restrictions designed to temper the confrontational tactics of anti-abortion demonstrators and thereby alleviate the emotional distress and resulting health risks experienced by women entering and leaving family planning clinics. (See, e.g., *Feminist Women's Health Center v. Blythe*, *supra*, 17 Cal.App.4th at pp. 1553, 1555; *Bering v. Share*, *supra*, 721 P.2d at p. 928; *Right to Life Advo. v. Aaron Women's Cl.* (Tex.Ct.App. 1987) 737 S.W.2d 564, 569; *Northeast Women's Center, Inc. v. McMonagle*, *supra*, 939 F.2d at p. 63; *Medlin v. Palmer* (5th Cir.1989) 874 F.2d 1085, 1090; *Portland Fem. Women's H. Ctr. v. Advocates For Life*, *supra*, 859 F.2d at p. 686; *Pro-Choice Network v. Project Rescue*, *supra*, 799 F.Supp. at p. 1427; *Planned Parenthood Ass'n v. Holy Angels Catholic Church*, *supra*, 765 F.Supp. at p. 620; *American C. of Ob. & Gyn., Pa. S. v. Thornburgh*, *supra*, 613 F.Supp. at p. 666.)

The findings of fact adopted by the trial court here reveal that it was precisely the health and well-being of the clinic's patients that constituted the court's primary concern. The trial court found, inter alia, that petitioners' pickets and counselors had "confront[ed]" and "intimidate[d]" women seeking the clinic's services, "force[d]" plastic fetuses and "counseling" on the clinic's staff and patients,

and "pursued" patients to their cars or public transportation in an effort to distribute literature and plastic fetuses. There was testimony that petitioners continued to accost, follow or encircle patients even after they indicated a desire to be left alone: "If the [car] windows were being rolled up, they would attempt to pass literature through the window"; "[one] client was crying and her sister or friend . . . was asking the people to leave her alone"; "[another] was really trying to get away from them"; when one woman refused to take a plastic fetus, they handed it to her small child; on one occasion staff members had to disperse a group of picketers who were surrounding a patient on the sidewalk; women who came to the clinic for services unrelated to abortion were also emotionally upset. Based on this and other evidence the trial court found that petitioners, their pickets and counselors, "caused some of the women seeking counseling or services from [the clinic] to become emotionally distraught."

One of the principal purposes of the trial court's place restriction was thus to constrain petitioners' confrontational tactics and thereby limit the physical intimidation of, and resulting emotional trauma to, the clinic's patients. Added to the stress that normally accompanies any medical treatment, the strain of being pursued and harried by anti-abortion pickets and sidewalk "counselors," however well-meaning, could result in serious medical problems. As mentioned earlier, such emotional distress could lead to inaccurate blood pressure readings or incomplete medical histories, complicate patient counseling, delay treatment, increase health risks, and prolong recovery. (See *Bering v. Share*, *supra*, 721 P.2d at p. 928; *Portland Fem. Women's H. Ctr. v. Advocates For Life*, *supra*, 859 F.2d at p. 683; *Planned Parenthood Ass'n v. Holy Angels Catholic Church*, *supra*, 765 F.Supp. at p. 620; *O.B.G.Y.N. Assoc. v. Birthright of Brooklyn* (1978) 407 N.Y.S.2d 903, 905–906; Note, *supra*, 101 Harv.L.Rev. at pp. 1865–1866.)

We conclude, therefore, that the place restriction serves a substantial governmental interest in protecting the patients' physical and emotional health and safety.[9]

C. Narrowly Tailored

While the state has a substantial interest in safeguarding the health and safety of its citizens who seek medical services, it must do so by narrowly tailored means which do not "unnecessarily interfer[e] with First Amendment freedoms." (*Schaumburg v. Citizens For a Better Environ.* (1980) 444 U.S. 620, 637.) Accordingly, we must also determine whether the place restriction was narrowly tailored to effectuate the state's interest.

In resolving this question, we are mindful of the Supreme Court's admonition that a narrowly tailored remedy is not synonymous with the "least restrictive means" of achieving the desired end. As the high court has explained, "[R]estrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" (*Ward v. Rock Against Racism*, *supra*, 491 U.S. at p. 797, quoting *United States v. Albertini* (1985) 472 U.S. 675, 689.) "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" (*Id.* at p. 799, quoting *United States v. Albertini*, *supra*, 472 U.S. at p. 689.) "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." (*Id.* at p. 800.)

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[9] In view of our conclusion that the place restriction serves a substantial governmental interest in preserving health and safety, we need not address the holding of the Court of Appeal that the restriction was necessary to safeguard the patients' right, under article I, section 1 of the California Constitution, to procreative choice.

In crafting the injunction, it is apparent that the trial court was guided by the paramount need to maintain an atmosphere around the clinic conducive to the health of its patients and its normal medical functions. As the Supreme Court has stated, "[t]he crucial question [in determining the reasonableness of a time, place or manner restriction] is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." (*Grayned v. City of Rockford*, *supra*, 408 U.S. at p. 116.) The threatening and intimidating behavior of petitioners' pickets and "counselors" was plainly inappropriate in the context of a health care facility treating women who are already undergoing the stress normally associated with abortions and other obstetrical or gynecological treatment. Confining the demonstrations to an alternative site across the street from the clinic responded most effectively to this threat by preventing petitioners from crowding patients and invading their "personal space." (*Pro-Choice Network v. Project Rescue*, *supra*, 799 F.Supp. at p. 1434.)

Such "clear zones" have been sanctioned by the United States Supreme Court in a variety of demonstration contexts (see, e.g., *Boos v. Barry* (1988) 485 U.S. 312 [sustaining ordinance prohibiting picketing within 500 feet of a foreign embassy]; *Cox v. Louisiana*, *supra*, 379 U.S. 559 [upholding ban on picketing near courthouse]) and, more recently, have been widely employed by state and federal courts in the context of anti-abortion protests. (See, e.g., *Planned Parenthood Ass'n v. Holy Angels Catholic Church*, *supra*, 765 F.Supp. at pp. 626–627 [court imposed "no-protest" zone within 25 feet of clinic entrance]; *Pro-Choice Network v. Project Rescue*, *supra*, 799 F.Supp. at pp. 1440–1441 [injunction established 15-foot "clear zone" around clinic entrances and people and vehicles seeking access thereto]; *Portland Fem. Women's H. Ctr. v. Advocates For Life*, *supra*, 859 F.2d at p. 686 [court sustained 12-foot "free zone" around clinic entrance]; *Northeast Women's Center, Inc. v. McMonagle*, *supra*, 939 F.2d at pp. 63–64 [court upholds injunction prohibiting all but six pickets within five hundred feet of clinic]; *Fargo Women's Health*

v. Lambs of Christ, *supra*, 488 N.W.2d at pp. 407–408 [court sustains injunction prohibiting more than two protesters within one-hundred-foot "bubble zone" around clinic]; see also Note, *supra*, 101 Harv.L.Rev. at pp. 1872–1874 [concluding that a "bubble zone" ordinance establishing a 100-foot buffer-zone around licensed medical facilities represented "the least restrictive means for serving the government's interest."].)

The nature and extent of the injunctions in these cases differ, naturally, depending upon the particular facts and geographic circumstances presented. They all embrace, however, the principle that a "clear zone" or "free zone" around a health clinic that does not foreclose alternative, albeit less confrontational means of communication present a narrowly tailored scheme for furthering the state's substantial interest in assuring the health and safety of women seeking abortions or other treatment. Nowhere is this principle more clearly stated than the widely cited decision in *Bering v. Share*, *supra*, 721 P.2d 918. There, the Washington Supreme Court upheld a geographical restriction strikingly similar to the one at issue here. Concerned that the confrontational nature of anti-abortion pickets and sidewalk "counselors" had created a "substantial risk" of harm to clinic patients, the trial court confined the protesters to the public sidewalk directly to the north and around the corner from the clinic entrance. (*Id.* at p. 925.) The Washington Supreme Court sustained the injunction, observing that a clear zone "away from the building's entrance and the sidewalk fronting the building" was necessary "to mitigate the severe emotional impact otherwise experienced by many patients, especially women who are visiting the Medical Building for abortion-related services." (*Id.* at p. 929.) The place restriction was justified, the court concluded, to relieve the clinic's patients from the trauma of navigating "a gauntlet of placard-carrying" protesters and was narrowly drawn to accomplish that interest. (*Id.* at p. 930; see also *Thompson v. Police Dept. of City of New York* (1989) 546 N.Y.S.2d 945 [police may properly erect barricade preventing anti-abortion "counselors" from moving along public sidewalk in

front of women's health clinic and speaking directly to patients]; *People v. Maher* (1987) 520 N.Y.S.2d 309 [semble].)

Thus, in the light of the record and consistent with case law across the country, we conclude that the place restriction was narrowly tailored to effectuate a substantial state interest.

Petitioners and the various amici curiae in support thereof contend, nevertheless, that the injunction was not narrowly tailored to the circumstances because patients were not physically harmed, because the restriction exceeds that necessary to secure access to the clinic, and because less restrictive means, such as a narrower zone or a limit on the number of protesters, were available to ensure patient safety. The absence of physical assaults, however, is not dispositive. The state's interest was to alleviate the hazardous medical environment created by the intimidating presence of protesters in close proximity to patients. Similarly, merely keeping the sidewalks free for passage does not address the problem identified by the trial court of protesters hounding and upsetting unwilling listeners. Nor would restricting the number of pickets and counselors in front of the clinic necessarily mitigate the emotional impact on women forced to navigate even a limited number of pickets and sidewalk "counselors."[10] And while it is always possible that the

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[10] At oral argument it was noted that the practice of limiting the number of pickets is often utilized in the context of labor disputes. Counsel for petitioners rejected this expedient as unduly violative of petitioners' First Amendment rights. We consider the instant case to be distinguishable in any event. In the typical labor dispute, the governmental interest centers on maintaining free passage in public areas or guaranteeing access to the target premises; generally, these goals may be effectively attained by limiting the number of pickets. Here, in contrast, the critical issue was not access, but health and safety. In these unique circumstances, the trial court was eminently justified in concluding that the protesters' proven confrontational tactics posed an intolerable threat to the emotional health and safety of the patients, whether those tactics were resorted to by two or twenty. That the trial court had limited the number of protesters on the sidewalk in its preliminary injunction does not in any way undermine its subsequent judgment. A preliminary injunction is not a determination of the ultimate rights in controversy, but simply a provisional remedy pending a trial on the merits. (*Continental Bak-*

trial court might have devised a geographical restriction a few feet closer to the clinic than the sidewalk across the street, that is not the litmus test of constitutional validity. As noted earlier, so long as "the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." (*Ward v. Rock Against Racism*, *supra*, 491 U.S. at p. 800.) Our mandate, in short, does not encompass "quibbling over a few feet." (*Portland Fem. Women's H. Ctr. v. Advocates For Life*, *supra*, 859 F.2d at p. 686.) Although plainly not petitioners' ideal vantage point, the location across the street offers a reasonably precise and narrowly tailored means of accomplishing the state's interest.

The several cases on which petitioners rely do not suggest otherwise. In *Mississippi Women's Medical Clinic v. McMillan* (5th Cir.1989) 866 F.2d 788, a women's health clinic applied for a preliminary injunction to restrain anti-abortion protesters solely on the ground that their patients' right to *choose* an abortion had been made more difficult by the protests. The federal district court denied the injunction and the court of appeals affirmed, noting the absence of any evidence that patients had been physically restrained or intimidated from entering the clinic and exercising their constitutional right to an abortion. (*Id.* at pp. 795–796.) The interest which we find to be pertinent here is not a woman's right to *choose* an abortion, but rather her right to have an abortion and other medical and family planning services in a safe and suitable environment.

Nor do *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662 and *Allred v. Shawley* (1991) 232 Cal.App.3d 1489, under-

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ing Co. v. Katz (1968) 68 Cal.2d 512, 528; *Socialist Workers etc. Committee v. Brown* (1975) 53 Cal.App.3d 879, 887–888.) Substantial evidence from the hearing on the permanent injunction established that the state's interest in protecting the patients required the preclusion of face-to-face, physical confrontations with the protesters.

mine our conclusion. These decisions deal exclusively with the propriety of an injunction barring anti-abortion protesters from private property. In each case, the Court of Appeal rejected the protesters' claim that a family planning clinic was the functional equivalent of a public forum, thus distinguishing our decision in *Robins v. Pruneyard Shopping Center*, *supra*, 23 Cal.3d 899. (*Planned Parenthood v. Wilson*, *supra*, 234 Cal.App.3d at pp. 1671–1672; *Allred v. Shawley*, *supra*, 232 Cal.App.3d at pp. 1495–1505.) That issue, as noted earlier, is not presented here. Nor, finally, does *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, support petitioners' cause. There the clinic moved for an injunction to exclude anti-abortion pickets from "any vantage," including streets and sidewalks, from which patients "can be identified." (*Id.* at p. 235.) The Court of Appeal ruled that the patients' privacy interest did not encompass a concomitant right to anonymity such as would justify the broad injunction sought. (*Id.* at pp. 240–243.) Here, however, the threat is not mere recognition, but emotional and physical health. The two cases are plainly distinguishable.

E. Adequate Alternatives

Lastly, petitioners contend that the place restriction denies them adequate alternative avenues of communication. They do not contend, however, that their picket signs cannot be seen, or that their presence and views cannot readily be perceived by clinic staff and patients. Rather, their principal complaint is that they will not be able physically to confront or "counsel" unwilling listeners because patients and staff will not be compelled to pass close to the demonstrators to enter the clinic. The objection is unavailing.

The First Amendment does not give petitioners the right to a captive audience, but simply "the opportunity to win the attention of passersby and engage them in conversation if the latter so desire." (*Bering v. Share*, *supra*, 721 P.2d at p. 930; see *Heffron v. Int'l Soc'y for Krishna Consc.*, *supra*, 452 U.S. at p. 655. ["The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity

to win their attention.'"].) As the United States Supreme Court has stated, "A group of demonstrators could not insist upon the right to cordon off a street or entrance to a public or private building and allow no one to pass who did not agree to listen to their exhortations." (*Cox v. Louisiana* (1965) 379 U.S. 536, 555)

The alternative site across the street from the clinic affords petitioners a vantage from which to picket and demonstrate that is reasonably close to the clinic and, judging from the photographic exhibits in the record, within plain view of their target audience, the clinic patients and staff. As noted above, petitioners do not contend that their signs cannot be seen or that their presence and views cannot readily be perceived by persons entering and leaving the clinic. Should anyone wish to be "counseled" by or otherwise converse with petitioners, it is a short walk across the street. (See *Bering v. Share*, *supra*, 721 P.2d at p. 931.) Accordingly, we conclude that the injunction leaves petitioners ample alternative avenues of communication.

CONCLUSION

We are charged in this matter with resolving a conflict arising from perhaps the most difficult and divisive subject of our day. Our resolution of this clash of interests is bound to satisfy neither party completely. Any limitation on petitioners' speech activities less comprehensive than a total exclusion from the area will assuredly result in some distress to patients and disruption of the clinic's normal operations. Yet any restriction on those activities, of any scope or nature, will undoubtedly be perceived by petitioners as inconsistent with their sense of moral duty.

With that understanding, we have cautiously reviewed the litigants' claims of encroachment on their respective rights and interests. As the end of the law is peace, we have sought a resolution that confers neither undue advantage nor unfair hardship on either adversary. Indeed, our object has been to narrow as much

as possible the accretion of power to one at the expense of the other.

Our review of the evidence and the legal precedents confirm that the restriction fashioned by the trial court was consistent with these ends. In affirming that judgment, we endorse a result that is manifestly reasonable and conducive to the fostering of greater harmony in the community.

Accordingly, the judgment of the Court of Appeal is affirmed.

CONCURRING OPINION BY BAXTER, J.

Today's decision will probably receive a fair amount of publicity. Groups on either side of the abortion debate may hail it as a political victory or defeat. In legal circles, it will be cited as support for erecting "buffer zones" around family planning clinics besieged by protestors. (See *Operation Rescue v. Women's Health Center* (Fla. 1993) 626 So.2d 664, cert. granted Jan. 21, 1994, *sub. nom. Madsen v. Women's Health Center, Inc.* ____ U.S. ____ [127 L.Ed.2d 98] (Dock. No 93-880).)

But abortion is not the central issue in this case. The free-speech problems presented could arise in any context. At issue is the extent to which the First Amendment's protection of political expression is limited by the rights of private citizens to conduct their lawful business without pain or hindrance.

In our society, all presumptions are in favor of unfettered expression, particularly where the forum is public and an issue of broad concern is involved. The First Amendment protects vigorous, even stinging, debate. The burden generally falls on the recipients of an unwanted message to turn away. (See *Frisby v. Schultz* (1988) 487 U.S. 474, 479-481; *Boos v. Barry* (1988) 485 U.S. 312, 318; *Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205, 208-211; *Cohen v. California* (1971) 403 U.S. 15, 21-26.)

The question remains, however, whether the same protection applies where the speaker seeks to engage in face-to-face confrontations with individual members of a targeted audience, and where the risk of intimidation, humiliation, or violence is high. What if such tactics are calculated to coerce unwilling targets into a particular course of conduct whether or not they are persuaded by the message the speaker seeks to convey? These issues assume special significance in a media-savvy age, where news coverage may serve as an additional incentive for staging a violent protest.

Such tactics do not necessarily fall within the aegis of the First Amendment. Disruptive conduct need not be tolerated simply be-

cause it has a symbolic component or facilitates speech. (*United States v. O'Brien* (1968) 391 U.S. 367, 376.) No individual is expected to endure "fighting words" and vicious personal attacks (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 309-310), or to experience hardship or a significant loss of privacy as a result of another's "free" speech. (*Frisby v. Schultz*, *supra*, 487 U.S. 474, 484-487; *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298, 302-304 (plur. opn. by Blackmun, J.), 306-308 (conc. opn. of Douglas, J.).)

Like the parties and lower courts, the majority applies the rigorous test for evaluating time, place, and manner restrictions on speech in a "public forum." Such an approach assumes that all protest activities leading up to and affected by the trial court's injunction constitute "protected speech" under the First Amendment. (*Frisby v. Schultz*, *supra*, 487 U.S. 474, 479.) I agree that the injunction is entirely sustainable under this test, but I am not certain such solicitude is warranted. In my view, some of the more confrontational activities prompting the "buffer zone" injunction crossed the line from protected expression to unprotected interference with the lawful activities of other citizens. For that additional reason, I conclude the "buffer zone" imposed by the trial court was proper.

BAXTER, J.

I Concur:

GEORGE, J.

DISSENTING OPINION BY KENNARD, J.

I respectfully dissent.

The federal Constitution protects both a woman's right to obtain an abortion during the early months of pregnancy and the right of every person to publicly and peacefully express an opinion on emotionally charged and controversial issues like abortion. When presented with a case like this one, in which these constitutional rights appear to collide, a court must take special care to ensure that both rights are effectively protected, so far as reasonably possible.

In this case, a medical clinic that was the subject of anti-abortion demonstrations asked a court for an injunction to protect itself and its clients. The trial court issued preliminary orders permitting only a small number of protesters on the sidewalk in front of the clinic. Eleven months later, it issued a permanent injunction prohibiting *any* protesters on that sidewalk, even though the clinic had not sought such a blanket prohibition. We granted review solely to consider the validity of the sidewalk exclusion. The majority concludes that the exclusion was proper. I cannot agree.

My disagreement is not with the majority's descriptions of the pertinent law or the relevant interests at stake. Rather, I disagree with the majority's account of the operative facts and the conclusion it reaches by applying the law to those facts. Relying on fragmentary and equivocal testimony, the majority derives from the trial court record a factual picture that is incomplete and misleading. As I will explain, the record supports the trial court's decision to establish a buffer zone around the clinic, but not its absolute prohibition of speech within that zone.

I. STANDARD OF REVIEW

When it reviews an order restricting First Amendment rights, an appellate court must " 'make an independent examination of the whole record' to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " (*Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 499, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 284–286; see also *In re Capital Cities/ABC Inc.'s to Sealed Transc.* (3d Cir. 1990) 913 F.2d 89, 92 [when considering claimed First Amendment violations, reviewing courts "exercise substantially broader review" including "independent consideration of the [trial] court's order and the factual findings inferred from the evidence before it"]; *United States v. Smith* (3d Cir. 1986) 787 F.2d 111, 113, fn. 1 [recognizing reviewing courts' "special obligation" to independently examine the record in "the First Amendment context"].) The United States Supreme Court has explained the rationale for this heightened standard of review, in these words: " '[I]t is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality.' " (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 924, quoting *Drivers Union v. Meadowmoor Co.* (1941) 312 U.S. 287, 293.) I fear this is precisely what has happened in this court with this case.

The majority pays lip service to the independent judgment standard of review, but it does not give the trial evidence the careful scrutiny that the standard requires.

II. FACTS AND PROCEEDINGS

The following are the relevant facts disclosed by application of the independent judgment standard of review to the record before this court. I begin with a description of the physical characteristics of the protest site, followed by a summary of pertinent trial court proceedings and the evidence presented in support of the permanent injunction at issue.

A. PHYSICAL CHARACTERISTICS OF THE PROTEST SITE

The site of the demonstrations at issue in this case is a public sidewalk in front of a building on Broadway in the City of Vallejo. Inside the building is a medical clinic operated by Planned Parenthood. The record discloses that the clinic is set well back from the street and sidewalk, with its entrances at or near the back of the building.

More precisely, the record shows that the clinic occupies the back of a one-story building, with a tax service business occupying the front. The staff entrance to the clinic is in the back of the building; its public entrance is on the side of the building near the back corner. The lot on which the building is situated is approximately 100 feet wide and 184 feet deep; the building itself is 36 feet wide and 64 feet deep.

In front of the building, between the tax service and the public sidewalk, is a parking area that extends around one side and to the back of the building. The distance between building and sidewalk is 44 feet. Two driveways intersect the sidewalk, providing clients and staff of the tax service and clinic with access to Broadway, a busy four-lane avenue. Across Broadway from the tax service and the clinic is an office occupied by Birthright of Vallejo/Benicia, an organization that opposes abortion.

B. THE COMPLAINT AND THE TEMPORARY RESTRAINING ORDER

This case began on August 8, 1990, when Planned Parenthood filed its verified complaint for injunctive relief. The complaint named as defendants Citizens for Life and Christine Williams, its director.

The complaint alleged that defendants, beginning in March 1990, had intimidated and harassed workers and clients of Planned Parenthood by verbally assaulting people entering and leaving the parking lot, by physically obstructing the driveway, and by forcing or attempting to force anti-abortion literature on people and vehicles at or near the clinic. The complaint further alleged that defendants had "disrupted and attempted to disrupt" business at the clinic through non-amplified noise and by gaining or attempting to gain entrance to the parking lot, grounds, walkways, and offices.

In the complaint, Planned Parenthood asked the court to enjoin defendants from: (1) trespassing on clinic property; (2) blocking the driveway; (3) harassing or threatening any person entering or leaving the clinic; (4) shouting words "likely to disturb the peace" of Planned Parenthood, its staff, or its clients; (5) bringing children to the picket line; (6) shouting or using amplification devices to disturb Planned Parenthood's business; and (7) otherwise attempting to intimidate and harass Planned Parenthood's staff and clients.

The complaint also specifically asked the trial court to restrict the number of picketers "to two on the public sidewalk." Planned Parenthood supported this request with two declarations, one by its attorney and the other by Janice Schoenfeld, Planned Parenthood's "escort coordinator." In her declaration, Schoenfeld described the anti-abortion protest activities of members and supporters of Citizens for Life. She then set forth the scope and justification for the proposed limit on the number of picketers, in these words: "One picket could stand on one of the sidewalks, and one on the other side of the driveway in safety in order to get their message across. All people going into the clinic would have to pass their signs. Their viewpoint would be clear to passers-by on Broadway."

On the same day (August 8, 1990), the trial court issued a temporary restraining order (hereafter TRO) that, among other things,[1] allowed no more than two protesters on the sidewalk di-

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[1] The TRO also prohibited the protesters from blocking the entrances to the parking lot, verbally harassing or making noises likely to disturb the peace of the clients and staff of the clinic, bringing children to the property,

rectly in front of the clinic. The TRO remained in effect until the trial court dissolved it on August 28, 1990.

C. THE HEARING AND THE PRELIMINARY INJUNCTION

On September 12, 1990, the court held a hearing on Planned Parenthood's motion for a preliminary injunction. The witnesses at the hearing were Janine Schoenfeld (the Planned Parenthood employee whose declaration had been submitted with the complaint) and Jeanette Hammer, an anti-abortion protester.

Schoenfeld testified that her job at the clinic included escorting women into the clinic from the parking lot on days that the clinic provided abortion services. Of particular relevance for our purposes, she testified that the protests organized by defendants began in March 1990, that she had never asked the police to arrest any protesters, that she had never made a citizen's arrest of any of the protesters, and that the police had come to the site once and had then admonished the protesters to stay on the sidewalk and to leave alone any person who so requested.

Hammer testified that she had picketed the clinic and had volunteered her services as a counselor to women approaching or leaving the clinic. She also testified that she had undergone an abortion herself and that this experience had led her to the view that pregnant women need information to help them make the important decision of whether or not to have an abortion.

One week after the hearing, on September 19, 1990, the court issued a preliminary injunction. In relevant part, the preliminary injunction "[r]estrict[ed] picketing and/or counseling to the public

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recording license numbers, or photographing persons coming to and from the building. These aspects of the TRO, and similar provisions in the preliminary and permanent injunctions, are not at issue here.

sidewalk in front of the building" but nonetheless provided that defendants could "maintain four (4) pickets and not more than two (2) shall be less than ten feet from any other picketer or counselor." The preliminary injunction remained in force until August 1, 1991, when the trial court issued the permanent injunction.

D. THE TRIAL AND THE PERMANENT INJUNCTION

Planned Parenthood's application for a permanent injunction was tried to the court on April 18, 1991. On that date, the preliminary injunction had already been in force for seven months. The trial lasted less than four hours and included the testimony of just three witnesses, all called by Planned Parenthood.

One of the witnesses was Janine Schoenfeld, the Planned Parenthood employee who had previously testified in support of the preliminary injunction. At the trial, she testified as follows: Before the issuance of the injunction, there had been eight picketers outside the clinic or in the clinic's parking lot, and on one weekend day there had been nearly one hundred protesters on the sidewalk in front of the clinic. In August of 1990, a police officer had told her that a representative of defendant Citizens for Life had contacted the police to find out "the rules regarding picketing at the clinic." With respect to events occurring after issuance of the preliminary injunction, the record shows the following exchange:

"Q. [by counsel for Planned Parenthood] Have you observed picket activity since the injunction?

"A. [by Schoenfeld] Yes, but they followed the injunction usually, except for picketers.

"[Counsel for Planned Parenthood]: Thank you. I have nothing further. Thank you.

"THE COURT: You say that they followed the injunction?

"THE WITNESS: They followed the injunction, yes since the injunction."

Schoenfeld was never asked to explain her cryptic remark that the protesters had obeyed the injunction "except for the picketers." The only elucidation was provided by the trial court's follow-up question, in which Schoenfeld reaffirmed that "they" had "followed the injunction." To the extent this equivocal remark might be construed as evidence that "picketers" had not "followed the injunction" (the majority does so construe it), it is the legal conclusion of a lay witness, unsupported by specific facts, and thus not competent evidence. (See Evid. Code, § 800; *People v. De Santis* (1992) 2 Cal.4th 1198, 1226; *Lombardo v. Santa Monica Young Men's Christian Assn.* (1985) 169 Cal.App.3d 529, 540; *Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 289.)

Another trial witness was Marsha Anderson, the clinic's director. At one point in her testimony, she stated: "I called the police to issue the injunction a couple of times, to hand it out to people who were on the sidewalk and were about to break the rules, or breaking the rules." Because the majority relies upon this statement as evidence that "police enforcement of the terms of the preliminary injunction had been necessary" (maj. opn., *ante*, 30 Cal.Rptr.2d at 632, [App. 72a]), this statement deserves careful examination.

In her testimony, Anderson never explained what specific acts by the protesters led her to conclude that they were "about to break the rules, or breaking the rules." Thus her testimony suffers from the same defect as the testimony of Schoenfeld: it is the legal conclusion of a lay witness, unsupported by specific facts, and thus it is not competent evidence. (Evid. Code, § 800.) Apparently seeking to avoid this difficulty, the majority infers that these "rule" violations consisted of specific acts, such as writing down license plate numbers and handing literature through car windows in the parking lot, that Anderson had described earlier in her testimony. But the record will not permit this inference. Rather, the record shows that plaintiff's counsel asked Anderson to describe incidents "that occurred during the period of picketing *before the injunction*" (italics added), and the record shows that Anderson's descriptions

of specific acts were in answer to this question. Anderson never stated that the protesters engaged in the same or similar conduct *after* issuance of the preliminary injunction, nor is there any evidence in the record to support a reasonable inference that such conduct occurred.

The third trial witness was defendant Christine Williams, the director of Citizens for Life. She testified that Planned Parenthood had called the police in August of 1990, but that since the injunction the picketing had been lawful.

On August 1, 1991—four months after the trial and eleven months after issuance of the preliminary injunction—the trial court issued a permanent injunction ordering that "[a]ll picketing, demonstrating or counseling at the PLANNED PARENTHOOD building shall only take place along the public sidewalk across the street from the PLANNED PARENTHOOD building."

III. FIRST AMENDMENT ANALYSIS

The First Amendment prohibits all government action abridging freedom of speech and assembly. (U.S. Const., 1st Amend.) The United States Supreme Court has described this constitutional guarantee, and its role in our political system, this way: "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." (*Cohen v. California* (1971) 403 U.S. 15, 24.)

Because this case concerns an injunction that prohibits picketing and distributing literature on a public sidewalk, there can be

no doubt that the First Amendment is implicated. Picketing and leafleting are expressive activities at the core of the First Amendment. (See, e.g., *Boos v. Barry* (1988) 485 U.S. 312, 318; *United States v. Grace* (1983) 461 U.S. 171, 176–177.) And a public sidewalk is a quintessential public forum, a place traditionally used for exchanging ideas and expressing opinions. (*Frisby v. Schultz* (1988) 487 U.S. 474, 480; *Cornelius v. NAACP Legal Defense & Ed. Fund* (1985) 473 U.S. 788, 802; *Clark v. Burleigh* (1992) 4 Cal.4th 474, 482.)

Yet, even in a public forum, the government may impose reasonable restrictions on the time, place, and manner of speech. To be reasonable, however, the restrictions must (1) be content neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.)

A. CONTENT NEUTRALITY

The permanent injunction's establishment of a protective buffer zone on the sidewalk in front of the clinic is, on its face, neutral as to content. It prohibits all speech in the buffer zone, not just speech carrying a certain message. But to satisfy the constitutional requirement of content neutrality, it is not enough that the restriction itself is neutral as to content. The justification for the restriction must take no account of the content of the restricted speech. (*Ward v. Rock Against Racism*, *supra*, 491 U.S. 781, 791 ["Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'"].)

Insofar as the justification for the buffer zone is ensuring ingress and egress to the clinic, it is content neutral. Regardless of their message, protesters may be enjoined from blocking driveways or otherwise physically obstructing the passage of automobiles and pedestrians going to or coming from the clinic. Also content neutral is the justification that excessive noise levels from sidewalk

protesters could compromise the medical treatment and welfare of patients within the clinic. No matter what the message sought to be conveyed, excessively noisy speech can be enjoined when it interferes with sound medical practice.

But the majority may violate the content neutrality requirement when it suggests that the buffer zone may be justified as a means of preventing emotional or psychological distress to women seeking abortion or other pregnancy-related services at the clinic. (See maj. opn., *ante*, 30 Cal.Rptr.2d at 636–637, [App. 80a–82a].) This emotional distress may in large measure be attributable to the content of the anti-abortion message, and not merely the manner in which the content is expressed. To the extent this is true, the offered justification is impermissible, for restrictions on speech may not be based on how the message affects those who receive it. (*Texas v. Johnson* (1989) 491 U.S. 397, 414 ["government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"]; *Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419 ["claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment"]; *Horizon Health Center v. Felicissimo* (Apr. 6, 1994) 135 N.J. 126, ____ [638 A.2d 1260, ____]; see also Tribe, American Constitutional Law (2d ed. 1988) § 12–3, p. 795, fn. 4.)

B. ALTERNATIVE CHANNELS OF COMMUNICATION

The permanent injunction confines all picketing to the opposite side of a busy, four-lane avenue. Persons entering or leaving the clinic may not notice the protesters standing across the roadway, and unless they take the effort to cross that roadway, they will be unable to converse with the protesters in a normal tone of voice or to peruse or accept their offered literature. At this distance from persons entering and leaving the clinic, the only speech left to the protesters is that conveyed by placards and shouted slogans.

Moreover, there is a substantial risk that the protesters' message will be grossly misinterpreted by casual viewers. Because the protests must take place in front of the office of Birthright of Vallejo/Benicia, those passing by, including pregnant women contemplating abortion, may assume the protest is directed against that organization, which opposes abortions, rather than against the medical clinic, which provides them.

Under these circumstances, I conclude that the permanent injunction does not leave the protesters with ample alternative channels of communication.

C. NARROW TAILORING

The majority incorrectly concludes that the prohibition here is narrowly tailored to serve a significant government interest. The government does, as the majority states (maj. opn., *ante*, 30 Cal.Rptr.2d at 636, [App. 79a]), have a significant interest in safeguarding the health and safety of people seeking medical services (see, e.g., *Beth Israel Hospital v. NLRB* (1978) 437 U.S. 483 [enforcing National Labor Relations Board order requiring hospital to allow union distribution of literature and solicitation in hospital cafeteria visited by patients]) and also in protecting private property and ensuring public safety (see *Horizon Health Center v. Felicissimo*, *supra*, 135 N.J. 126, ____ [638 A.2d 1260, ____]). But identifying significant government interests is only part of the constitutional requirement. A restriction on speech must be narrowly tailored to serve those interests.

The preliminary injunction allowing four picketers on the sidewalk was in effect for eleven months. Had the terms of the preliminary injunction been less than completely effective in protecting the health and safety of the clinic's patients, Planned Parenthood would surely have presented detailed evidence of specific problems during this time. Indeed, as the plaintiff in the action (see Evid. Code, § 500), and as the party seeking to restrict speech (see *Healy v. James* (1972) 408 U.S. 169, 184-185), Planned

Parenthood was required to do so or have this crucial factual issue resolved against it. Yet the relevant evidence at trial, which I have summarized, includes no such testimony.

As this court has explained, a complete prohibition on picketing is permitted "where past picketing has become so irrevocably blended with acts of violence, physical intimidation or other unlawful conduct as to give rise to a justifiable belief that future picketing is likely to result in a continuance of the illegal acts." (*Steiner v. Long Beach Local No. 128* (1942) 19 Cal.2d 676, 683.) Conversely, when the picketing "has been in general lawful," even though there may have "infrequent illegal acts not of a serious character," then a total prohibition on picketing is not permitted and "only the unlawful conduct will be enjoined." (*Id.* at p. 684.) Here, the evidence fails to establish that the protesters resorted to physical violence, nor does it establish repeated and serious violations of the preliminary injunction. I therefore conclude that the more severe restrictions of the permanent injunction, completely prohibiting speech on the public sidewalk in front of the clinic, were not reasonably necessary to protect the health and safety of the clinic's patients.

The majority offers various arguments against this conclusion, but none is persuasive.

Relying on a case upholding a limitation on noisy demonstrations (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 106), the majority appears to suggest that the total ban on picketing within the sidewalk buffer zone is necessary to protect the patients inside the clinic from disturbance. (Maj. opn., *ante*, 30 Cal.Rptr.2d at 635, [App. 79a].) But another portion of the permanent injunction, the legality of which is not before us, prohibits the picketers from "making any noise that can be heard inside the premises." Because this other provision adequately protects the patients inside the clinic from disruption, and because there is no credible evidence that sidewalk protesters generated excessive noise during the life of the preliminary injunction, the ban

on picketing in front of the clinic may not be justified as a noise prevention measure.

The majority relies heavily on *Frisby v. Schultz*, *supra*, 487 U.S. 474, as supporting a complete prohibition of picketing directed against "captive" listeners. (Maj. opn., *ante*, 30 Cal.Rptr.2d at 636 & fn. 6, [App. 79a].) In *Frisby*, the United States Supreme Court upheld an ordinance prohibiting picketing " 'before or about the residence or dwelling of any individual. . . .' " (487 U.S. at p. 477.) The court found there were ample alternative opportunities for the exercise of free speech, emphasized the unique nature of the home as a citadel of repose, and concluded that the picketing in that case was not directed at the public. (*Id.* at pp. 485–486.)

The reasoning of *Frisby* does not support the majority's result here. This case involves picketing of a medical clinic, not a residence. The ample alternatives to picketing cited in *Frisby*—such as the ability of protesters to distribute literature door to door (487 U.S. at p. 484)—do not exist here because the anti-abortion protesters cannot effectively reach their intended audience—pregnant women contemplating abortion—by distributing literature door to door. Their message, moreover, *is* directed to the public. Finally, the problem of "captive" listeners, to the extent it may once have existed in this case, has been effectively eliminated. The injunction expressly prohibits activity physically obstructing passage to and from the clinic, and Planned Parenthood presented no evidence at trial that passage was in fact obstructed during the life of the preliminary injunction.

Next, the majority asserts that the blanket prohibition against picketing in front of the clinic is necessary to prevent emotional trauma to patients entering the clinic, trauma which in some cases could endanger the health of the patients. As I have previously discussed, any such justification must be based on the manner rather than the content of the expression. Certainly, a court has the authority and obligation to enjoin any mode of expression that amounts to harassment or intimidation and that poses a significant health risk. And, just as certainly, pregnant women seeking access to health services, including abortion, must be protected from serious emotional trauma caused by abusive forms of expression. But the record in this case contains no evidence that women entering Planned Parenthood's clinic were subjected to any such harassment or intimidation during the 11-month life of the TRO and preliminary injunction. Thus, the emotional wellbeing of the clinic's patients had already received effective protection without the permanent injunction's total prohibition on speech within the buffer zone.

The majority accurately states that buffer zones around abortion clinics are "widely employed by state and federal courts in the context of anti-abortion protests." (Maj. opn., *ante*, 30 Cal.Rptr.2d at 639, [App. 85a].) But the majority fails to acknowledge that these same courts have either allowed a limited number of protesters within the buffer zone (e.g., *Northeast Women's Center, Inc. v. McMonagle* (3d Cir. 1991) 939 F.2d 57, 63–64 [six picketers permitted]; *Fargo Women's Health v. Lambs of Christ* (N.D. 1992) 488 N.W.2d 401, 407–408 [two picketers permitted], or they have drawn the boundaries of the buffer zone so narrowly that protesters standing outside can still communicate effectively with persons entering and leaving the clinic (e.g., *Pro-Choice Network v. Project Rescue* (W.D.N.Y. 1992) 799 F.Supp. 1417, 1434 [clear zone of only 15 feet from clinic entrances]; *Planned Parenthood Ass'n v. Holy Angels Catholic Church* (N.D.Cal.1991) 765 F.Supp. 617, 626 [clear zone of only 25 feet from clinic entrances]; *Bering v. Share* (Wash. 1986) ____ Wn.2d ____, ____ [721 P.2d 918, 929–931] [picketing permitted on sidewalk next to, but not in front of, medical facility].)

Most recently, in *Horizon Health Center v. Felicissimo*, *supra*, 135 N.J. 126 [638 A.2d 1260], the New Jersey Supreme Court considered the validity of an injunction that prohibited all picketing on a public sidewalk in front of an abortion and family planning clinic. The injunction followed a noisy demonstration by 120–140 anti-abortion protesters that had blocked not only the sidewalk,

but also a portion of the street in front of the clinic, and that had caused half of the women scheduled to appear at the clinic to cancel their appointments.

Nonetheless, the New Jersey Supreme Court concluded that the facts of the case "lend themselves to a more permissive restriction than the one the trial court imposed," and that "rather than prohibiting all expressional activities on the sidewalk directly in front of the [clinic], the injunction should have allowed a limited, controlled form of expression near the entrance while restraining the troublesome mass of protestors to a location across the street." (*Horizon Health Center v. Felicissimo*, *supra*, 135 N.J. 126, ____ [638 A.2d 1260, ____].) Unlike the majority in this case, the New Jersey Supreme Court recognized its obligation to balance the protected interests of *both* the demonstrators and the patients. In the court's words, "The injunction should give consideration to the right of the protestors to make their presence known and to the role of sidewalk counselling in that process, while at the same time protecting against any harassment of the patients or others who wish to enter the clinic." (*Id.* at p. ____.)

Admittedly, the constitutional requirement of narrow tailoring does not mean that a time, place, and manner restriction on speech must be the "least restrictive" alternative. (*Ward v. Rock Against Racism*, *supra*, 491 U.S. 781, 798.) But it emphatically *does* mean that any such restriction may not burden "substantially more speech than is necessary to further the government's legitimate interests." (*Id.* at p. 799; see also, *Carroll v. Princess Anne* (1976) 393 U.S. 175, 183 [stating that an order restricting peaceful picketing "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order"].) Here, the issue posed by the sidewalk prohibition is not just "quibbling over a few feet," as the majority would have us believe. (Maj. opn., *ante*, 30 Cal.Rptr.2d at 640, [App. 88a].) The difference between the preliminary injunction, allowing carefully restricted speech within the buffer zone, and the permanent injunction, exiling all protesters

across a broad avenue, is substantial and must be fully justified. The record utterly fails to provide the required justification.

For these reasons, the permanent injunction's sidewalk restriction, totally prohibiting speech within the buffer zone, does not satisfy the constitutional requirement of narrow tailoring.

IV. CONCLUSION

In this case, anti-abortion protesters sought to express their views in front of a medical clinic by picketing and distributing literature, protected First Amendment activities that cannot be enjoined merely because the anti-abortion content of the message is offensive or even upsetting to the clinic's staff and to women seeking abortion services. The abortion protesters sought to engage in these activities on a public sidewalk, a place that by long tradition has been recognized as an appropriate and constitutionally protected site for expression protected by the First Amendment. The clinic, for its part, has sought to prevent activities by the protesters that threaten the health of its patients or otherwise substantially interfere with its operations.

The trial court granted a preliminary injunction allowing only four protesters on the sidewalk, limiting the noise level of the protests, and barring obstructive behavior. The 11-month life of the preliminary injunction was ample to test its effectiveness in controlling abusive and obstructive conduct by the protesters. Had the protesters resorted to physical violence at any time, or had they committed serious and willful violations of the preliminary injunction, I would have no hesitation in affirming an order excluding them from the sidewalk buffer zone. As I said earlier, courts have the authority and the obligation to protect pregnant women seeking access to health services from serious emotional trauma caused by abusive methods of expression. But the record contains no evidence from which this court can conclude with any sort of confidence that the preliminary injunction was at all inadequate to protect the health and safety of the clinic's patients.

The sensitive adjustment of competing rights and interests that the federal Constitution requires was achieved in this case by the preliminary injunction. There was no need, practically or legally, to banish the protesters to the opposite side of the street, thereby barring them from peacefully expressing their views on the public sidewalk in front of the clinic. Therefore, I must conclude that the permanent injunction's sidewalk restriction is invalid under the First Amendment to the United States Constitution.

KENNARD, J.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. 94-334

CHRISTINE WILLIAMS, *et al.*,

Petitioners

v.

PLANNED PARENTHOOD SHASTA-DIABLO, INC.

ON WRIT OF CERTIORARI to the Supreme Court of California.

THIS CAUSE having been submitted on the petition of a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the Supreme Court of California for further consideration in light of *Madsen* v. *Women's Health Center, Inc.*, 512 U.S. _____ (1994).

IT IS FURTHER ORDERED that the petitioners, Christine Williams and Citizens for Life recover from Planned Parenthood Shasta-Diablo, Inc. ($300.00) Three Hundred Dollars for their costs herein expended.

October 31, 1994

Clerk's costs: $300.00

(2)

No. 95-576

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1995

CHRISTINE WILLIAMS and CITIZENS FOR LIFE,

Petitioners,

vs.

PLANNED PARENTHOOD SHASTA-DIABLO, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the California Supreme Court after remand in this case conforms to *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

PARTIES TO THE PROCEEDINGS

Respondent Planned Parenthood Shasta-Diablo, Inc., is a California non-profit corporation. It has no parent company or subsidiaries. No other corporations are parties to this action. This statement is submitted pursuant to Rule 29.1.

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Respondent Planned Parenthood Shasta-Diablo, Inc. ("Planned Parenthood"), respectfully submits this opposition to the petition for writ of certiorari to the Supreme Court of the State of California.

INTRODUCTION

In its first opinion in this case, the California Supreme Court upheld an injunction imposing a place restriction on anti-abortion picketing under what was then the settled test for evaluating content-neutral time, place and manner restrictions on public forum speech, *i.e.*, whether the restriction was narrowly tailored to advance a significant governmental interest. (*See, e.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983)). Shortly thereafter, this Court issued its decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), holding that the differences between a generally applicable statute and an injunction warranted a "somewhat more stringent application of general First Amendment principles" in the injunction context. (114 S. Ct. at 2524). It concluded that the appropriate test was "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (114 S. Ct. at 2525). This Court's subsequent order remanding this case stated that "[t]he judgment is vacated and the case is remanded to the Supreme Court of California for further consideration in light of *Madsen v. Women's Health Center, Inc.*"

The duty of the California Supreme Court upon remand was thus to carefully review its decision and determine whether a different result was warranted in light of *Madsen*. It did so. It meticulously reviewed the facts of *Madsen* and the Court's application of the new constitutional standard to those facts. It then fully and fairly reconsidered its decision and concluded that the place restriction was consistent with *Madsen*.

Petitioners have presented no basis for review of that decision. Their petition for certiorari only reargues the facts and inferences found by the state courts and presents no substantial constitutional question.

RESPONSE TO STATEMENT OF THE CASE

A. Factual Background

Planned Parenthood operates a family planning clinic in Vallejo, California. (App. 2a). The clinic provides a range of family planning services, including abortions. (*Id.*).

The clinic is in a single-story office building that Planned Parenthood shares with a tax service. (App. 70a, 42a). A parking lot adjoins the clinic on one side and to the rear of the building; the lot is for the exclusive use of Planned Parenthood and the tax service. (App. 70a, 46a). There is a short, narrow sidewalk in front of the office building, punctuated by two driveway entrances. (App. 2a, 42a).

In March 1990, petitioners[1] started to gather at the clinic, primarily on Thursdays when abortions were performed, and began a pattern of harassment and intimidation of Planned Parenthood's patients and staff. (App. 2a-3a, 42a-43a). The number of protesters varied from a handful to over 100. (App. 2a-3a, 43a).

Petitioners picketed throughout the parking areas, driveways and sidewalk in front of the office building, carrying signs protesting abortion. (App. 3a, 71a). They obstructed cars entering the driveway into the clinic's parking lot. (App. 3a, 46a).

1. Petitioners are Christine Williams and Solano Citizens For Life, an unincorporated association.

As cars attempted to turn into the clinic driveway, petitioners would surround them and try to pass literature through the windows before they could be rolled up. (App. 3a, 71a). They followed patients to and from their cars or to the bus stop, attempting to hand them literature and replicas of plastic fetuses. (App. 42a, 3a). They also accosted, surrounded or followed patients on the sidewalk. (App. 71a, 83a). Petitioners stationed "counselors" in the parking area who pressed literature and plastic fetuses on those entering the clinic. (App. 3a). On one occasion, they handed a plastic fetus to a small child after his mother had refused to take it herself. (App. 83a). They often stood directly in front of the doorway to the clinic, making it difficult to enter or exit. (App. 42a, 46a).

Petitioners' activities caused some of the patients seeking medical care or counseling at the clinic to become emotionally distraught. (App. 43a, 71a, 83a). Planned Parenthood was forced to escort patients to ensure their unimpeded passage to the door of the clinic. (App. 3a-4a, 42a, 46a). On at least one occasion, staff members had to disperse a group of pickets who were surrounding a patient on the sidewalk. (App. 71a, 83a).

B. The Trial Court Decision

In August 1990, the trial court issued a temporary restraining order prohibiting petitioners from blocking or harassing any person coming into or out of the clinic and restricting their picketing to the sidewalk in front of the clinic. (App. 64a-66a). After a hearing, the trial court issued a preliminary injunction that restricted the number of pickets on the sidewalk to four and required that at least two of these pickets remain ten feet apart from the other two. (App. 67a-68a).

At trial on the permanent injunction, testimony was introduced concerning petitioners' harassment and intimidation

of patients and staff at the clinic. (App. 72a). There was also testimony that police enforcement was necessary because pickets on the sidewalk had violated the terms of the preliminary injunction. (App. 3a, 72a).

Following trial, the court made findings, based on the uncontradicted evidence, that petitioners (1) confronted and intimidated women seeking Planned Parenthood's services; (2) interfered with or obstructed entrance to and from the clinic; (3) pursued patients to their cars or public transportation in an effort to distribute literature or plastic fetuses; (4) conducted these activities on a weekly basis, with as many as 100 people involved; and (5) caused some of the women seeking counseling or services from Planned Parenthood to become emotionally distraught. (App. 42a-43a).

In August 1991, the trial court entered judgment for Planned Parenthood, issuing a permanent injunction restricting petitioners' picketing activities to the sidewalk immediately across the street from the clinic. *(Id.)*.

C. The California Supreme Court Decision

The California Supreme Court upheld the exclusion of petitioners from the sidewalk directly in front of the clinic. Conducting an independent review of the record pursuant to *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 489-511 (1984), the court concluded that the trial court's findings should not be disturbed "under any standard." (App. 70a, n.1). It held that those findings supported the sidewalk restriction as necessary to protect the health and safety of clinic patients (App. 82a-84a).

After that decision was published, this Court issued its decision in *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), holding that the test to be applied in evaluating an

injunction should be "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." (*Id.* at p. 2525). Petitioners then filed a petition for certiorari in this case, which the Court granted, ordering the decision to be vacated and reconsidered in light of the *Madsen* decision.

Following further briefing and oral argument, the California Supreme Court thoroughly reconsidered the matter and concluded that the injunction was valid under the new standard set forth in *Madsen*. (App. 19a). It found that *Madsen* strongly supported the conclusion that the buffer zone in this case was amply justified by at least two significant governmental interests, the interest in protecting the health and safety of clinic patients, and the interest in protecting unfettered access to the clinic and ensuring that protesters did not block traffic. (App. 14a-15a). It concluded that the state's recognized interest in protecting the "health and well-being of the patients" acknowledged in *Madsen* (114 S. Ct. at 2528) justified the limited buffer zone in light of the physical confrontations and consequent heightened stress and anxiety to which patients were being subjected moments before receiving medical treatment, including surgery. (App. 16a). It further found that the buffer zone was justified as a means of protecting access based upon the limited confines around the clinic in light of evidence that petitioners had, in fact, interfered with and obstructed entrance to and exit from the clinic and had failed to comply with a more limited preliminary injunction. (App. 14a).

The California Supreme Court also determined that the buffer zone burdened no more speech than necessary to preserve these governmental interests, and hence met the heightened standard articulated in *Madsen*. (App. 17a-18a). It based this conclusion on the physical layout of the clinic and its environs, and evidence that the protesters had physically interfered with

access to the clinic, blocked passage, and followed and surrounded patients, causing heightened stress and anxiety. (App. 17a-18a). It observed that a less restrictive alternative — limiting the number of pickets on the sidewalk — had been tried unsuccessfully by the trial court. (App. 17a). It found that the site across the street was in plain view of persons entering and leaving the clinic and afforded petitioners a reasonable vantage point from which to communicate their message without physically intimidating patients. (App. 18a-19a).

REASONS FOR DENYING THE WRIT

I.

THE STATE SUPREME COURT'S DECISION WAS BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD.

Petitioners argue that the California Supreme Court relied on inference rather than evidence in upholding the injunction. Petitioners support that argument by isolating and quoting a single phrase from the court's opinion[2] and studiously ignoring the balance of the record, which contains abundant evidence (not inference) to support the court's decision.[3] The decision did not rest on the hypothetical possibility that one or two protesters might block the narrow sidewalk, although such an inference was

2. Petitioners rely on the following sentence: "The court noted that, given the 'close physical confines' of the area around the clinic, 'even one or two picketers could effectively block pedestrian or vehicular traffic.' " (Petition at 9).

3. Moreover, petitioners are in a poor position to argue about what was and was not in the record before the trial court in that they chose not to request that all of the proceedings below be transcribed and included in the record on appeal. (*See* App. 47a, n.1).

fully supported by the evidence (showing that the sidewalks are only four to six feet wide). (App. 53a, n.3). Rather, the court relied on a number of facts that proved that petitioners' activities were interfering with patients' unfettered access to the clinic in ways very similar to those in *Madsen*.[4]

The sidewalk in front of the clinic is described by witnesses as "small" — a description confirmed by the photographs (App. 53a) — and is punctuated by two driveway entrances into the clinic parking lot. (App. 17a). The picketers' "standard procedure" was to have two to eight picketers walk along the sidewalk and across the driveways in front of the clinic carrying large signs. (App. 53a). Witnesses testified that picketers would walk so slowly across the driveways "that people [in their cars] have to sit in the street and wait to turn for a long time, or a lot of clients turn into the adjacent building to go through into the parking lot." (App. 53a). Picketers would approach the cars and attempt to pass literature through the windows, even as they were being rolled up. (App. 2a-3a, 71a). One of *petitioners'* witnesses testified that picketing and "counseling" activities on the sidewalk were impractical and potentially dangerous because they "would impede traffic, would probably cause traffic

4. Contrary to petitioners' implication, *Madsen* does not require evidence that access has, in fact, been blocked in order to justify an injunction. Indeed, there was no evidence in *Madsen* that the protesters had ever completely blocked ingress to and egress from the clinic. Rather, the Court made it clear that the 36-foot buffer zone was predicated on the interest in ensuring free and unfettered access by patients and staff:

> This [36-foot] speech-free buffer zone requires that petitioners move to the other side of Dixie Way and away from the driveway of the clinic, where the state court found that they repeatedly had interfered with the *free access* of patients and staff.

(114 S. Ct. at 2526) (emphasis added).

accidents." (App. 3a). Petitioners also stationed two "counselors" near the entrance to the clinic. (App. 46a). The "counselors" would approach patients as they attempted to enter the clinic, offering them literature and plastic fetuses. (*Id.*). They often stood directly in front of the clinic doorway, making it difficult to enter or exit. (*Id.*). Planned Parenthood was forced to use escorts to accompany its clients through the picket lines and past the picketers in the parking lot. (App. 42a). In one instance, the escorts dispersed a group of protesters encircling an emotionally distraught patient on the sidewalk. (App. 71a).

It was on the basis of this *evidence,* not inference, that the trial court found that petitioners interfered with and obstructed entrance to and egress from the clinic.[5] (App. 42a). Based upon an independent review of the evidence in the record (App. 70a), the California Supreme Court concluded that "petitioners had significantly blocked driveways, surrounded patients' cars, and stalked and obstructed patients walking to and from their cars and public transportation, and had thereby significantly 'interfered' with clinic access." (App. 15a-16a).

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5. It was also on the basis of evidence (not inference as petitioners imply), that the California Supreme Court found that the protesters had violated the preliminary injunction. One witness testified that the demonstrators followed the preliminary injunction "usually, except for picketers." (App. 3a, 72a, n.2). This testimony was corroborated by that of the clinic director, who testified that she had been forced to call the police to enforce the preliminary injunction, " 'to hand it out to people who were on the sidewalk and were about to break the rules' or breaking the rules." (App. 3a).

II.

SPEECH ACTIVITIES DO NOT BECOME INSULATED FROM RESTRICTION MERELY BECAUSE THEY ARE CONDUCTED IN A PUBLIC FORUM.

Petitioners create a false dichotomy between conduct that "immediately and inescapably invades a medical facility, thus putting patients at risk" and speech activity that is "confined to a public forum." (Petition at 9-11). The two are not mutually exclusive.

When activities in a public forum occur directly outside a medical facility and the speech and conduct targets patients about to undergo surgical procedures, then such activity, though technically "confined to a public forum," will also "put patients as risk." Protest activity need not literally invade the clinic in order to cause dangerous physical effects on the patients. Petitioners thus focus on the wrong issue. The question is not whether the speech activities "invade" a medical facility. The question is whether the activity is fundamentally incompatible with the "nature of [the] place, [and the] pattern of its normal activities." *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972).

This Court has relied on this incompatibility principle to sustain regulation of public forum speech activities outside courthouses (*Cox v. Louisiana,* 379 U.S. 559 (1965)), polling places (*Burson v. Freeman,* 504 U.S. 191 (1992)), and homes (*Frisby v. Schultz,* 487 U.S. 474 (1988)). In none of these cases was there evidence that the speech activities had literally invaded the facility, or that the noise from those activities was even audible in the facility.[6] Rather, it was the appropriateness of those

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6. *See, e.g., Frisby,* 487 U.S. at 476 ("The picketing was generally

(Cont'd)

activities *near* the facility in light of the special characteristics of the facility that justified the restrictions on speech activity.

Just as the special characteristics of the school, home, courthouse or polling place environment may be considered in assessing restrictions on protest activity, the special characteristics of a medical facility can and should be considered in evaluating restrictions on targeted picketing of such a facility. Here, petitioners' activities were fundamentally incompatible with the normal activities of a medical clinic. The principal targets of petitioners' activities were medical patients and their conduct caused some of these patients to become emotionally distraught, and thereby exacerbated the anxiety, fear or apprehension that ordinarily accompanies any invasive medical procedure.[7] (App. 46a, 16a, 82a-83a).

Moreover, the conduct here was occurring not merely *near*

(Cont'd)
orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of streets, loud and unnecessary noises, or disorderly conduct.").

7. Petitioners argue that there was no direct evidence that any patients' health or safety was *actually* jeopardized, but that the court "simply found" that some women had become emotionally distraught. (Petition at 11). It is apparently petitioners' position that protection of the health and safety of medical patients cannot support injunctive relief absent evidence of "adverse physical effects" on at least one patient. (Petition at 11). Such a rule would be barbaric, and has no support in the case law. This Court has never held that actual harm to particular individuals or to the administration or operation of a particular facility, such as a school or court, is the *sine qua non* of content-neutral restrictions on speech activity. Moreover, this Court explicitly recognized in *Madsen* that protection of both the psychological and the physical well-being of patients "held 'captive' by medical circumstance" were among the governmental interests that could justify an appropriately tailored injunction restricting speech activities. (114 S. Ct. at 2526). Direct evidence of physical harm to patients was not required to sustain the restriction under *Madsen*.

the clinic but at the only public access point: the driveway and sidewalk entrances to the clinic property. Hence, patients attempting to enter or leave the clinic had no choice but to submit to petitioners' offensive conduct.[8] As *Frisby* illustrated, the state's interest in safeguarding individual privacy is particularly strong in instances in which the listener cannot readily avoid the message. "[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan v. United States Post Office Department*, 397 U.S. 728, 736 (1970). The "First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Frisby v. Schultz*, 487 U.S. at 474.[9]

8. In *Madsen*, the Court pointed out the distinction between "the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places." (114 S. Ct. at 2527). It quoted *Frisby v. Schultz* for the proposition that the " 'type of focused picketing prohibited by [the state court injunction] is *fundamentally different* from more generally directed means of communications.' " *Id.*, *quoting Frisby v. Schultz*, 487 U.S. at 486 (emphasis added). It noted that "[h]ere the picketing is directed primarily at patients and staff of the clinic."

9. In *Madsen*, this Court implicitly acknowledged the significance of the captive audience doctrine in upholding the noise restrictions while striking the "images observable" restriction. It reasoned that the noise restrictions burdened no more speech than necessary to ensure the health and well-being of clinic patients because the "First Amendment [did] not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." (114 S. Ct. at 2528). The same was not true, however, of the "images observable" provision. The Court stated that,

> if the blanket ban on "images observable" was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by "images observable" inside the clinic

(Cont'd)

Petitioners cite a number of cases to support the proposition that confrontational or unwelcome speech deserves protection. However, most of these cases involved content-based restrictions on speech in a public forum and in none of the cases was the appropriateness of the place and manner of the speech activity in light of the characteristics of a particular facility or the condition of the target audience a matter of particular concern.[10] Here, by

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(Cont'd)

> would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic.

(114 S. Ct. at 2529). Here patients entering and leaving the clinic could not avoid unwanted contact with petitioners except by blocking both their ears and their eyes, which was clearly not a reasonable alternative under the circumstances. In order to obtain access to the medical facility, they had to submit to petitioners' intimidating activities.

10. *See Boos v. Barry*, 485 U.S. 312, 321 (1988) (Statute prohibiting display of certain signs within 500 feet of foreign embassies was "justified *only* by the content of speech. Respondents . . . do not point to . . . congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies.") (emphasis in original); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (Invalidating statutory prohibition against paid circulars as content-based restriction on core political speech subject to most exacting scrutiny); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (First Amendment precluded recovery of damages against class of people participating in boycott of white-owned businesses); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (Statute prohibiting solicitation for any religious or charitable cause without prior approval of secretary of public welfare facially violative of First Amendment); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (Prohibition of all picketing of businesses with intent to influence others not to patronize or accept employment violated First Amendment on its face); *Lovell v. Griffin*, 303 U.S. 444 (1938) (Ordinance prohibiting distribution of circulars, handbooks, advertising or literature without a permit facially invalid as striking "at the very foundation of the freedom of the press by subjecting it to license and censorship.").

contrast, the restrictions on speech activity were content-neutral and were justified based on the interference with access and the impact of the conduct on the health and safety of clinic patients. They were not designed to shield patients from the emotional impact generated by the content of petitioners' message.[11] Petitioners remain free to communicate their message — via slogans, chants, songs, signs, banners, symbols, or any other form of communication — so long as they do not do so on the narrow sidewalk or driveways fronting the clinic. The restriction is on the place and manner of petitioners' activities, not the content of their message, precisely because it was the place and manner of communication that interfered with access and threatened the health and safety of clinic patients.

---

11. *Madsen* did not suggest, as petitioners imply, that the avoidance of emotional trauma generated by speech activity could never justify restrictions on speech. Rather, the Court cited the well-established proposition that "[a]s a general matter, . . . in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." (114 S. Ct. at 2529, citations and internal quotation marks omitted). The concern underlying this proposition is that the content of speech not be restricted solely because of the possibility that it might provoke an emotional reaction. This is a far cry from petitioners' apparent position that physical intimidation and harassment of patients as they attempt to enter a medical clinic cannot be subjected to content-neutral restrictions. It was the place and manner in which petitioners were delivering their message — immediately outside a medical clinic by impeding, surrounding, following and harassing patients — not the content of that message, that justified the restriction in this case.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the petition for certiorari be denied.

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No. 95-576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CHRISTINE WILLIAMS and CITIZENS FOR LIFE, *Petitioners,*

v.

PLANNED PARENTHOOD SHASTA-DIABLO, INC., *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of California

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INTRODUCTION

The decision below affirms an extreme imposition on free speech, namely, the creation, by injunction, of a "First Amendment cage." Petitioners are forbidden to exercise their free speech rights, save in a small area across a four-lane thoroughfare from their intended audience. *See* Diagram B, App. 40a.

The California Supreme Court rendered the decision below after remand from this Court for reconsideration in light of *Madsen v. Women's Health Center*, 114 U.S. 2516 (1994). Because the trial record could not support this sweeping injunction under the *Madsen* test, the court improvised, creating both new factual findings and a new state interest justifying the restrictions.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *MADSEN*.

A. *The injunction was not necessary to protect access.*

Respondent does not, and indeed cannot, dispute that before *Madsen*, both the state supreme court and the court of appeals agreed that the injunction was not narrowly tailored to protect pedestrian and vehicular traffic. App. 74a, n.4; App. 87a n.10 ("the critical issue here was not access"). Nor can Respondent cite any trial court findings that petitioners had interfered with access from the street or sidewalk.

Instead, Respondent simply asserts that the record "contains abundant evidence . . . to support the court's decision." Opp. at 6. Respondent then goes on to cite evidence that was presented at the hearing on the preliminary injunction, or evidence that was presented about events occurring before the preliminary injunction issued. As Justice Kennard points out in her careful review of the evidence, there is nothing in the record to support a finding that the petitioners interfered with access after the preliminary injunction issued. In fact, other than

a few ambiguous comments from Respondent's witnesses,[1] there was no evidence at all about the petitioners' conduct after the preliminary injunction issued.[2] App. 25a–26a. (Kennard, J., dissenting).

Finally, Respondent attempts to clean up after the lower court, by stating, "Based upon an independent review of the record . . ., the California Supreme Court concluded that 'petitioners had significantly blocked driveways, surrounded patients' cars, and stalked and obstructed patients . . .'" Opp. at 8 [citing App. 15a–16a]. In fact, what the decision below says is that "the trial court found" that the petitioners had engaged in this conduct. This is patently false. The trial court made no such findings. Pet. at 13. The Supreme Court simply projected its "findings" onto the trial court.

B. *Constitutionally protected activity is not "fundamentally incompatible" with the operation of a medical facility.*

Respondent asserts that petitioners erred in distinguishing speech activity which invades a medical facility, such as noise, from that which is confined to the public sidewalk. Opp. at 9. Respondent states, "The question is whether the activity is fundamentally incompatible "with the 'nature of [the] place, [and the] pattern of its normal activities.' *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972)."

---

[1] Respondent does not dispute that two ambiguous statements by respondent's witnesses constitute the sole basis for the lower court's inference that petitioners had violated the injunction, and consequently the sole basis for the inference that the injunction had failed to protect access. Cf. Opp. at 8 n.5; Pet. at 13–14; App. 25a–26a, 30a–32a.

[2] Respondent notes that the petitioners failed to request that transcripts of all the proceedings below be included in the record. Opp. at 6 n.3. The omitted portions of the record of the trial contain simply the closing arguments and a motion by petitioners, not evidence. App. 47a n.1. Moreover, the evidence at the hearing on the preliminary injunction obviously would have no bearing on the critical issue of whether the petitioners obeyed the preliminary injunction and whether there was any interference with access after the preliminary injunction issued.

Revealingly, the restriction upheld in *Grayned* was a *noise* restriction, specifically an ordinance prohibiting excessive noise in the vicinity of schools. This Court's decision focussed on the disruptive effect of noisy demonstrations on the activities going on *in* the classrooms; there was no attempt to define demonstrations *per se* as incompatible with the school environment. In fact, the Court stated, "The antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty 'audience' *enters and leaves* the school." Id. at 120 (emphasis added).

Respondent also cites *Frisby v. Schultz*, 487 U.S. 474 (1988), in which this Court narrowly construed an ordinance prohibiting residential picketing as a ban on "focused picketing taking place solely in front of a particular residence." *Id.* at 483. In doing so, this Court stated, "Although in many locations we expect individuals simply to avoid speech they do not want to hear, [citations omitted], *the home is different*." *Id.* at 484 (emphasis added). Citing the intrusive nature of the speech into the home, the Court stated, "The resident is figuratively, and perhaps literally, trapped *within the home*, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. *Id.* at 487 (emphasis added).

Respondent's attempt to use these cases to support the lower court's decision is misguided. In these cases, this Court specifically distinguished the speech activity at issue from speech activity where both the speech and the intended audience are in a public forum. Yet Respondent sees in these cases a rationale for banning petitioners and their message from the public sidewalk where the intended audience is. According to Respondent, its clients are a "captive audience" not because they cannot get away from the speech, but because they encounter it at all.[3]

---

[3] The other cases cited by Respondent in support of its "incompatibility principle" are similarly inapposite. *Cox v. Louisiana*, 379 U.S. 559 (1965), must be read in light of *U.S. v. Grace*, 461 U.S. 171 (1983), in which this Court struck down a ban on carrying flags or signs on the sidewalks adjacent to the Supreme Court. This Court held that "a total ban on that conduct is no more necessary for the maintenance of peace and tranquility than on any other sidewalks in the city." *Id.* at 182.

C. *The lower court erroneously held that the zone could be justified to protect the health and safety of patients by preventing "stress and anxiety."*

Respondent states that requiring evidence that at least one patient's health had been adversely affected by the petitioners "would be barbaric." Opp. at 10 n.7. In Respondent's view, the finding that some women became "emotionally distraught" is sufficient to justify banishing petitioners from the sidewalk.

Petitioners have never disputed that many women considering abortion are in an emotionally delicate state. Further, such women may indeed become "emotionally distraught" upon confronting the reality of abortion contained in petitioners' anti-abortion message. Of these, some women go on to abort, while others reconsider their decision and choose to carry their baby to term. To require petitioners to communicate their message in such a bland, unconvincing way that no woman becomes "emotionally distraught" is a travesty of the First Amendment.[4]

Respondent, of course, asserts that it is not the content of the message, but the conduct of the petitioners which has caused women to become emotionally distraught. However, in the context of abortion, which engenders intensely emotional reactions, to determine whether content or conduct is responsible for the emotional reaction of the audience is practically impossible. Courts which attempt such a determination are bound to fall into the same trap as did the court below. Rather than considering whether the petitioners engaged in any objectively unlawful conduct, the court characterized the petitioners' expressive activities of leafletting and counselling as unlawful harassment and intimidation, and therefore enjoinable, because of their emotional impact on the audience. The First Amendment, however, does not tolerate restrictions on speech predicated on subjective audience reactions. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Texas v. Johnson*, 491 U.S. 397 (1989).

In *Burson v. Freeman*, 114 S.Ct. 1846, 1851 (1992), this Court upheld a content-based restriction on speech in the vicinity of polling places, as the result of "a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy." This Court held that the restriction served, and had served for over a century, the *compelling* state interest in preventing voter fraud and intimidation.

[4] Cf. *Cannon v. City and County of Denver*, 998 F.2d 867, 874 (10th Cir. 1993) ("although the words 'killing' or 'murder' are certainly emotionally charged, it is difficult to conceive of a forceful presentation of the anti-abortion viewpoint which would not assert that abortion is the taking of a human life").

As a practical matter, a trial court in Vallejo recently abandoned all pretense that the injunction in the instant case was imposed to prevent unlawful conduct by the petitioners. On November 7, nine individuals were found guilty of violating Cal.Pen.C. § 166(4) (disobedience of a lawful court order) despite a complete absence of substantial evidence that they were connected to or acting in concert with the petitioners in this case. *People v. Conrad, et al.*, Vallejo-Benicia Muni. Ct. Nos. 113148, 113214. The evidence at trial was clear, and the judge as trier of fact acknowledged, that the defendants were engaged in peaceful picketing on the public sidewalk in front of the clinic. The evidence was also undisputed that the defendants, only one of whom lives in northern California, were not acting in cooperation with or at the behest of the petitioners, nor did they even know the petitioners.

However, two of Respondent's employees testified that they had a written legal opinion from Respondent's attorneys, stating that "anyone doing what those named in the injunction were prohibited from doing" was thereby "acting in concert" with the petitioners, and thus was in violation of the injunction. The city attorney agreed with this interpretation and authorized the arrests and prosecutions of the defendants. The trial court judge refused to disapprove this overreaching interpretation, and indeed apparently endorsed it, thus converting the injunction into a judicially-created ordinance, for the special benefit of Respondent.[5]

[5] The trial court judge has indicated that he will impose jail sentences on at least two of the defendants, and quite possibly others. He has also indicated that he is considering imposing sentences of community service to be performed for Respondent Planned Parenthood, i.e., compelling pro-life persons to work for an abortion provider.

This outrageous ruling is, of course, the logical outcome of Respondent's arguments, adopted by the court below. If pro-life speech activity in front of an abortion clinic is "fundamentally incompatible" with the activities of a medical facility in that it is likely to cause some women to become emotionally distraught, then it is irrelevant whether the persons engaging in the activity are the petitioners who allegedly have abused their right to be on the sidewalk, or complete strangers to the litigation. The purpose of an injunction creating a small "First Amendment cage" at such a distance from the site is not to ensure access or to protect clients from unlawful conduct. Rather, the obvious purpose of this injunction is to insulate Respondent's clients from pro-life speech activity, particularly leafletting and one-on-one contact. The Vallejo criminal court is enforcing the injunction in that spirit.

II. CONFUSION OVER THE MEANING OF *MADSEN* IS GROWING IN THE LOWER COURTS.

This Court has pending before it a petition for certiorari in *Reali v. Feminist Women's Health Center*, No. 95-366 (filed Aug. 30, 1995). In that case, as in the present case, pro-life citizens seek review of a judgment imposing a speech-restrictive injunction outside an abortion facility. While the speech-free zone in *Reali* is smaller than that imposed in the case at bar, the judgment in *Reali* contains a $100,000 attorney fee award against the enjoined picketers and sidewalk counselors.

Reali and the present case form the two blades of a scissors cutting off all leafletting, picketing, and verbal contact in public fora outside abortion facilities. The decision below authorizes injunctions banning such expression anywhere on the entire sidewalk, while *Reali* authorizes concomitant crushing attorney fees liability. The result is the effective elimination of free speech in public fora for all but the foolhardy and the judgment-proof.

This disturbing trend extends beyond California. Within the past two months, the Second and Ninth Circuits of the federal court of appeals have weighed in with decisions likewise limiting pro-life speech in public fora outside abortion facilities. The first case, *Pro-Choice Network of Western New York v. Schenck*, No. 92-7302 (2d Cir. Sept. 28, 1995) (en banc) (1995 WL 570394), upholds both speech-free zones and personal "floating bubble" zones. A panel of the Second Circuit, properly applying *Madsen*, initially overturned these restrictions, which were in force at every abortion facility in the Western District of New York. *Pro-Choice Network of Western New York v. Schenck*, 34 F.3d 130 (2d Cir. 1994). After the appellate mandate had already issued, the Second Circuit allowed an untimely petition for rehearing en banc, and after rehearing reversed the panel.

The nine-judge lead opinion of Judge Oakes held that the speech restrictions were constitutional even though an initial, less restrictive temporary restraining order had already successfully ensured access. Slip op. at 21-22. The lead opinion also held that this Court's decision did not invalidate a provision requiring counselors to back off fifteen feet whenever the intended audience requested. Slip op. at 26-27.

A ten-judge "concurring" opinion by Judge Winter was more sweeping in its revision of First Amendment law:

> Generally, targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to the protests. . . .
>
> In my view, therefore, there is no right to invade the personal space of individuals going about lawful business . . . or to do anything that cannot be fairly described as an attempt at peaceful persuasion. Moreover, an extensive record of coercion or obstruction is not required to justify an injunction requiring physical separation and an end to such conduct. The power of even isolated threats or obstructions to exert a chilling effect on some members of society need not be ignored. The timid have a right to go about their business, and it is no embarrassment for a federal court to say so.

Winter conc. at 5-6. In other words, everyone is a captive audience when coming from and going to a place of personal or professional business, simply because they did not choose to be exposed to the speech. The term "chilling effect" has been co-opted by Judge Winter

to mean the effect of speech on the listener, not the effect of restrictions on a would-be speaker. Furthermore, Judge Winter explicitly endorses a one-strike-and-you're-out rule, by holding that even an isolated incident of obstruction may warrant a speech-free zone.

In an even more recent case, the Ninth Circuit upheld the imposition by ordinance of a personal "floating bubble" zone. *Sabelko v. City of Phoenix*, No. 94-15495 (9th Cir. Oct. 19, 1995) (1995 WL 611422), *rev'g* 846 F. Supp. 810 (D. Ariz. 1994). The challenged ordinance required any person engaged in "demonstration activity" within 100 feet of an abortion facility to "withdraw" at least eight feet from any person so requesting. The district court held that the restriction was unconstitutional, but a panel of the Ninth Circuit reversed. The majority held that *Madsen* had established standards for speech restrictions outside health care facilities, and that "the Supreme Court in *Madsen* expressly recognized that persons approaching a health care facility represent a 'captive audience,' thus rejecting the position . . . that a public area adjacent to a health care facility must be considered, for all purposes, an open forum." 1995 WL 611422 at *3. The fact that *Madsen* itself struck down a ban on approaching without consent did not preclude a ban on failing to withdraw upon request. *Id.* at *3-*4.

However, as Judge Meskill noted in his dissent in *Pro-Choice Network*, this Court has limited application of the "captive audience" doctrine to cases in which the speech intrudes on the home, or in which "the audience is physically constrained by its environment." Meskill dis. at 16 (citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)). Consistent with those limitations,

> [t]he *Madsen* Court simply recognized that women *in* the clinic were "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

Id. at ii, n.5 (original emphasis).[6]

In *Madsen*, this Court formulated a demanding standard of review for speech-restrictive injunctions. 114 S. Ct. at 1515-26. *Madsen* plainly calls for meticulous parsing of both the injunctive provisions at issue and the factual circumstances alleged to support those restrictions. Yet, in the wake of *Madsen*, lower courts have disregarded both the heightened scrutiny and the demanding factual showing *Madsen* requires, and reduced it to a simple license to uphold speech-free zones, whether stationary or floating, outside abortion facilities.[7]

CONCLUSION

The petition for certiorari should be granted.

---

[6] *See also Edwards v. City of Santa Barbara*, 883 F. Supp. 1379 (C.D. Cal. 1995), *appeal docketed* No. 95-55595 (9th Cir. April 14, 1995) (striking down ordinance establishing speech-free zones and personal bubble zones in front of health care facilities; "this Court notes that Defendants cite no authority for applying the captive audience doctrine to individuals on public sidewalks en route to medical treatment. Indeed, the captive audience doctrine has traditionally been limited to situations where an individual is at home. [citing *Frisby v. Schultz*, 487 U.S. 474 (1988)]. The captive audience doctrine has been applied only sparingly in public fora. [citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)]").

[7] *See also Hill v. City of Lakewood*, No. 94CA0856 (Colo. Ct. App. July 13, 1995) (1995 WL 411983) (upholding statewide statute prohibiting, in vicinity of medical facility, approaching within eight feet of another person without prior consent, for the purpose of leafletting, picketing, or engaging in protest, education, or counseling).

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SUPREME COURT OF THE UNITED STATES

CHRISTINE WILLIAMS AND CITIZENS FOR LIFE *v.* PLANNED PARENTHOOD SHASTA-DIABLO, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 95–576. Decided March 17, 1997

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting from denial of certiorari.

The issue in this case is the constitutionality of an injunction against abortion protestors. The injunction limits their First Amendment activities to a sidewalk separated from the clinic that is the object of their protest by a busy four-lane avenue. The case has made its way back here after we set aside the Supreme Court of California's earlier judgment approving the injunction, 7 Cal. 4th 860, 873 P. 2d 1224 (1994), and remanded the case so that the court could reconsider its holding in light of our decision in *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753 (1994). 513 U. S. 956 (1994). On remand, the Supreme Court of California concluded that the provision in question "is equally valid under the new standard set forth in *Madsen*," and therefore "reaffirm[ed] the judgment in favor of Planned Parenthood." 10 Cal. 4th 1009, 1012, 898 P. 2d 402, 404 (1995). That was in my view patent error, and has been confirmed as such by *Schenck* v. *Pro-Choice Network of Western N. Y.*, 519 U. S. ___ (1997). I think it important to the dignity of this Court and the integrity of its processes to set aside what can only be regarded as an intentional evasion of its decrees. I would grant the petition for certiorari, summarily reverse the judgment

of the Supreme Court of California, and remand for further proceedings.

This case—unlike *Schenck*—is not one in which the record reveals instances of serious unlawful conduct by clinic protestors. The following was the testimony of Janice Schoenfeld, the "escort coordinator" of the clinic, at the hearing on the application for a permanent injunction:

> "Q. Did you ever see any of this group of defendants prevent somebody from getting in the front door of the clinic?
>
> "A. No.
>
> "Q. Did you ever see them manhandle any of your clients?
>
> "A. No.
>
> "Q. Was anybody, to the best of your knowledge, that wanted to get an abortion, prevented from getting an abortion?
>
> "A. No.
>
> "Q. Did you ever attempt to make a citizen's arrest of any of the defendants?
>
> "A. No, I did not.
>
> "Q. Do you know if any of them were ever arrested?
>
> "A. Not at the Vallejo clinic, that I know of. Some have been in other Operation Rescue activity.
>
> . . . . .
>
> "Q. Did you ever see any of the defendants prevent any cars from parking in the parking lot?
>
> "A. Not prevent them from parking, no." Tr. 54–55.

This is a record so devoid of threatening physical confrontation it would make an old-fashioned union organizer blush. Yet the trial court entered—and the Supreme Court of California approved—an injunction severely curtailing the speech rights of clinic protestors in a public forum.

The basis for that injunction—and for the Supreme Court of California's initial approval of it—was the perceived government interest in preventing "increased stress and anxiety" among abortion patients. 7 Cal. 4th, at 872–876, 873 P. 2d, at 1230–1233 (internal quotation marks and citation omitted). As the Supreme Court of California explained, "emotionally jarring confrontations with anti-abortion pickets or sidewalk 'counselors' may pose serious health risks." *Id.*, at 874, 873 P. 2d, at 1232. The "substantial governmental interest in protecting the patients' physical and emotional health and safety" justified restricting the abortion opponents to areas far removed from the clinic. *Id.*, at 876, 873 P. 2d, at 1233.

This holding was no longer supportable after we vacated the Supreme Court of California's judgment in light of *Madsen*, and remanded the case for further proceedings. *Madsen*, in disallowing an injunction which prevented abortion opponents from approaching persons seeking services at an abortion clinic, said:

> "Absent evidence that the protesters' speech is independently proscribable (*i.e.*, 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand." 512 U. S., at 774 (citation omitted).

Despite this holding, the Supreme Court of California, on remand, did not abandon but reaffirmed its assertion that avoiding upset to the clinic's clients justified keeping the protesters at a distance. 10 Cal. 4th, at 1021, 898 P. 2d, at 410. When the defendants again petitioned us for certiorari, we held the case pending our decision in *Schenck*.

Whatever glimmer of hope *Madsen* might have left regarding the legitimacy of the Supreme Court of California's "emotional upset" justification was entirely snuffed by *Schenck*, in which we reiterated, in the most unmistakable terms, that there is no legitimate government interest in protecting the "right of the people approaching and entering [clinics] to be left alone" on the

public streets, 519 U. S., at ___ (slip op., at 24). *Schenck* would require, without further analysis, a reversal of the judgment here, but for one additional factor: In its second opinion in this case—after our remand in light of *Madsen*—the California Supreme Court for the first time discerned a second state interest in support of the injunction: an interest in "ensuring unfettered access" to the clinic, 10 Cal. 4th, at 1022, 898 P. 2d, at 410. This, it should be noted with suspicion, is an interest which the court had expressly disclaimed in its first opinion, saying that "the critical issue [is] not access, but health and safety." 7 Cal. 4th, at 879, n. 10, 873 P. 2d 1235, n. 10.

It is not normally our practice to scrutinize the record support for the grounds asserted by state courts or lower federal courts as a basis for rejecting constitutional claims. We have, however, sometimes been disposed to do so when the abridgment of First Amendment rights was at issue. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 915, and n. 50 (1982); *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963). And we should in my view *always* be disposed to do so when the grounds are newly minted after a remand, contradict what was said before the remand, and bear indication of an attempt to evade the consequences of our holding prompting the remand. That is the case here; and an examination of the record for support of the newly minted ground discloses that it does not exist.

The trial court made many findings regarding activities tending to cause, not blocking of the entrances to the clinic parking lot, but "increased stress and anxiety" to clinic patrons and staff: protesters "confront and intimidate women seeking [respondent's] services," "force . . . 'counseling' upon [respondent's] staff and clients," "have called staff 'murderers' or asked them not to 'kill babies' in the presence of small children," "have pursued [respondent's] clients to their cars or public transportation in an effort to distribute literature and the plastic fetuses," and "bring small children to the area who run

up and down the public sidewalk in front of plaintiff's premises." App. to Pet. for Cert. 42a–43a. The trial court also made findings regarding the impact of these activities on respondent, its patrons, and its staff: "[Respondent] must escort its clients through picket lines and [petitioners'] 'picketers/counselors' in its parking lot," and "[t]he conduct of [petitioners] and their picketers/counselors have *[sic]* caused some of the women seeking counselling or services from plaintiff to become emotionally distraught." *Ibid.* But the only finding remotely related to access to the clinic is the following: Protesters "stand directly in front of [respondent's] office door and interfer *[sic]* with or obstruct entrance to and from [respondent's] clinic." *Id.*, at 42a. This finding (which, by the way, has no support in the record if it is interpreted to mean *physical* obstruction[1]) pertains to behavior *at the entrance to the clinic*—which is some 100 feet inside the parking lot, from which the injunction (without objection) excludes the protesters entirely. It obviously cannot support excluding protesters from the public sidewalk adjoining the entrances to the parking

[1]There was no testimony that petitioners had *blocked* the entrance, but only statements that they had stood very close to the entrance, trying to pass literature or other material to those going in. See Tr. 17–18 (testimony of Janice Schoenfeld at hearing on preliminary injunction) ("I did not say they blocked the door. I said they stand very close to the door") ("Q. Has any one of your clients ever been prevented from entering the clinic? A. No"); *id.*, at 54 (testimony of Schoenfeld at hearing on permanent injunction) ("Q. Did you ever see any of this group of defendants prevent somebody from getting in the front door of the clinic? A. No"); *id.*, at 65 (testimony of Marsha Anderson at hearing on permanent injunction) ("Q. Did you observe any of your patrons being denied entrance into the clinic by any of the defendants? A. I know they progressed to the front door, interrupted them, but not prohibited them"). Of course if, as the trial court believed, subjecting abortion clients to "emotional upset" was unlawful, forcing clients to expose themselves to such unlawful activity in order to enter or exit the clinic *would* constitute "interfer[ing] with" their access—and that is evidently what the trial court had in mind.

lot, where it has never been so much as suggested that any blocking of access occurred. The Supreme Court of California's opinion misrepresents this, saying that "the trial court found here, that petitioners had significantly blocked driveways . . . ." 10 Cal. 4th, at 1023, 898 P. 2d, at 411. The only authority cited for this proposition is that portion of the court's own pre-*Madsen* opinion which recites *(inter alia)* the trial court's finding that protestors "pursued patients to their cars . . . to distribute literature." 7 Cal. 4th, at 867, 873 P. 2d, at 1227. This obviously does not establish (or even suggest) that petitioners "blocked driveways."[2]

Of course, even if there had been a finding of interference with free access to the parking lot, the challenged injunction would require further findings to establish that no restraint short of total exclusion of free speech from the public sidewalk—such as limiting the number of protestors—could have eliminated the interference. Cf. *Mine Workers* v. *Bagwell*, 512 U. S. 821, 823 (1994) (injunction imposing numerical limit on picketers). A conclusion that complete exclusion of protestors was necessary in this case would be difficult to square with the history of what happened: The trial court initially issued a temporary restraining order *drafted by respondent*, which *permitted two picketers* on the sidewalk in front of the clinic. App. to Pet. for Cert. 64a–66a. Shortly thereafter, it issued a preliminary injunction *increasing to four* the number of picketers allowed on

[2]In a separate portion of its opinion, the Supreme Court of California stated (without any citation of record support) that "[o]ne of the tactics of the sidewalk picketers was to walk slowly across the driveway entrance, thereby delaying cars attempting to turn into the parking lot from the street." 10 Cal. 4th, at 1012, 898 P. 2d, at 404. Apart from the fact that the *trial court* made no such finding in connection with its entry of the injunction, see App. to Pet. for Cert. 42a–43a, "delaying" the entry of cars into the lot as an incidental result of lawful picket activity is by no means equivalent to "blocking driveways."

that sidewalk. *Id.*, at 67a–68a. Despite this apparent sign of success—and without any request by respondent for more restrictive relief—11 months later the trial court imposed the permanent injunction at issue here, banning all picketing in front of the clinic. The reason, of course, was that (as the Supreme Court of California concluded the first time around) the trial court was not concerned about "impeding access"; it was concerned about preventing "stress and anxiety."

Since the trial court did not find that the challenged injunction provision was necessary to secure access, the Supreme Court of California took it upon itself to provide the requisite finding. "[T]he evidence at trial," the court proclaimed, "indicated that picketers had not followed the preliminary injunction . . . ." 10 Cal. 4th, at 1024, 898 P. 2d, at 411–412. For this the court offers no support other than citation of its earlier opinion in this case, 7 Cal. 4th, at 866–867, n. 2, 873 P. 2d, at 1227, n. 2, which in turn relies upon nothing more probative than the following testimony of Janice Schoenfeld:

> "Q. Have you observed picket activity since the injunction?
>
> "A. Yes, but they followed the injunction usually, except for picketers.
>
> "MS. RYER: Thank you. I have nothing further. Thank you.
>
> "THE COURT: You say that they followed the injunction?
>
> "THE WITNESS: They followed the injunction, yes, since the injunction." Tr. 52–53.

Even if the record did establish *some* violation of the preliminary injunction, it would still not establish a violation *related to access*, supporting the proposition that banishment to the other side of the avenue was "the only practicable means of ensuring unfettered access," 10 Cal. 4th, at 1022, 898 P. 2d, at 410. As far as appears, any failure to "follo[w] the injunction" might

have related to one of the many prohibitions that had nothing to do with obstructing access. Indeed, the odds are in favor of that, since almost all of the prohibitions in the preliminary injunction were of that character. The record simply does not contain the facts necessary to support the challenged provision in the name of protection of access.

* * *

This case having been held pending the issuance of our opinion in *Schenck;* and *Schenck* having come out four-square against the principal theory relied upon by the Supreme Court of California; it is quite impossible to understand why any disposition short of a reversal and remand would be appropriate. If we were prepared to take at face value the court's post-*Madsen*-invented "obstruction of entrances" justification, then there was no reason to hold the case in the first place. The hold was correct, and today's denial of certiorari smiles upon injustice to these petitioners and disregard of the processes of this Court. I dissent.